

No. 12135

United States
Court of Appeals
for the Ninth Circuit

BERT RUUD,

Appellant,

VS.

AMERICAN PACKING & PROVISION CO.,
a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Idaho, Eastern Division

FILED

FEB 25 1949

PAUL P. O'BRIEN,
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INDEX

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PAGE

Amended Answer 8

Appeal:

Certificate of Clerk to Transcript of Record
on 181

Designation of Record on..... 181

Notice of 180

Statement of Points on (U.S.C.A.)..... 183

Certificate of Clerk to Transcript of Record on
Appeal 181

Complaint 2

Exhibit A—Contract of Sale, dated Nov. 4,
1940, by and between Bert Ruud and Ameri-
can Packing & Provision Co..... 4

Designation of Record on Appeal..... 181

Findings of Fact and Conclusions of Law.... 169

Judgment 179

Memorandum Opinion 165

Names and Addresses of Attorneys..... 1

Notice of Appeal..... 180

Opinion, Memorandum 165

Statement of Points on Appeal (U.S.C.A.)... 183

Transcript of Testimony and Proceedings..... 12

Exhibits for Defendants:

2—Letter of Nov. 3, 1946, Bert Ruud to
Louis Salerno 27

11—Letter of Aug. 22, 1947, Bert Ruud to
American Packing and Provision Co..... 121

14—Letter of Nov. 12, 1946, Bert Ruud to
Louis Salerno 133

15—Letter of Nov. 15, 1946, Louis Salerno to
Bert Ruud 164

Exhibits for Plaintiff:

3—Idaho Falls Auction Co. Sales Record
dated 8/6/47 41

4—Idaho Falls Auction Co. Sales Record
dated 8/6/47 41

5—Idaho Falls Auction Co. Sales Record
dated 9/10/47 67

6—Idaho Falls Auction Co. Sales Record
dated 9/17/47 68

7—Letter of August 26, 1947, American
Packing & Provision Co. to Bert Ruud.. 84

10—(Designated Parts) Deposition of Bert
Ruud 93

Witnesses for Defendant:

Ruud, Bert	
—direct	140
Salerno, Louis	
—direct	125
—cross	135

Witnesses for Plaintiff:

Blaine, O. T.	
—direct	62
Fallentine, E. W.	
—direct	115
—cross	118
—redirect	122
Peck, Garth B.	
—direct	83
—cross	87
—redirect	88
Robertson, Orland	
—direct	45
—cross	51
Ruud, Bert	
—direct	19
—cross	92
—redirect	34

iv.

	PAGE
Skelton, Ray	
—direct	63
—cross	69
—recalled, direct	90
—cross	91
Smith, J. J.	
—direct	35
—cross	42
—recalled, direct	69
—cross	79

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* Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States Court for the District of
Idaho, Eastern Division.

No. 1464

AMERICAN PACKING & PROVISION CO.,
a corporation,

Plaintiff,

vs.

BERT RUUD,

Defendant.

COMPLAINT

Plaintiff complains of defendant and for cause of action alleges:

I.

That the plaintiff is, and was at all times herein mentioned, a citizen of the State of Utah, being a corporation duly organized and existing thereunder, with its principal place of business at Ogden, Utah, and is, and was at all times herein mentioned, qualified to do and doing business in the State of Idaho; that the defendant is a citizen and resident of Bonneville County, Idaho. That the matter in controversy between the parties exceeds, exclusive of interest and costs, the sum of Three Thousand (\$3,000.00) Dollars.

II.

That at all times herein mentioned plaintiff was engaged in carrying on a general livestock slaughtering and meat packing business, with its principal slaughtering and processing plant at Ogden, Utah. That the defendant is, and was at all times

herein mentioned, engaged in carrying on a general ranching business near Irwin, Bonneville County, Idaho, and engaged in raising, feeding, buying and selling livestock for commercial purposes.

III.

That on or about the 4th day of November, 1946, plaintiff and defendant made and entered into a certain contract in writing, [3] a copy of which is hereunto attached, marked Exhibit "A", hereby referred to and by this reference made a part hereof. That plaintiff has at all times done and performed all of the conditions, stipulations and agreements on its part to be performed at the time and in the manner therein specified.

IV.

That on or about September 3, 1947, and within the time so provided for in said contract, plaintiff called for and demanded of defendant delivery to it of the cattle in said contract referred to, but defendant failed and refused, and still fails and refuses to deliver to plaintiff said cattle, or any of them.

V.

That by reason of the facts aforesaid and defendant's breach of the said contract, Exhibit "A", by his failure and refusal to deliver to plaintiff the said cattle as aforesaid, plaintiff was and is damaged in the sum of Thirty-one Thousand Twenty-six (\$31,026.00) Dollars, demand for which has been duly made and refused.

Wherefore, Plaintiff prays judgment against the Defendant for the sum of Thirty-one Thousand

Twenty-six (\$31,026.00) Dollars, together with interest thereon from September 3, 1947, for plaintiff's costs herein expended, and for such other and further relief as may be proper.

O. R. BAUM,
BEN PETERSON,
J. A. HOWELL,
D. L. STINE,
N. R. OLMSTEAD,
Attorneys for Plaintiff.

(Duly Verified.)

[4]

EXHIBIT "A"

CONTRACT OF SALE

This Agreement, made this 4th day of November, 1940, by and between Bert Rudd of Irwin, Idaho, hereinafter called the Seller, and American Packing & Provision Co. of Ogden, Utah, hereinafter called the Buyer.

Witnesseth:

Whereas, the Seller is the owner of certain steers now held upon Seller ranch near Irwin, Idaho, which said steers are branded O L Hip; and,

Whereas, the Buyer desires to purchase three hundred (300) head of said steers upon terms and conditions mutually agreed upon, which terms and conditions are hereinafter set out;

Now, Therefore, it is hereby mutually agreed between the parties hereto as follows:

(1) The Seller hereby agrees to sell and deliver to the Buyer, and the Buyer hereby agrees to purchase from the Seller three hundred (300) head of the steers hereinbefore described.

(2) The Buyer herewith pays to the Seller, receipt of which by the Seller is hereby acknowledged, the sum of Three Thousand (\$3,000.00) Dollars, as partial payment upon the purchase price of said steers, the full amount of which purchase price is to be determined at the times and in the manner set out in Paragraph 4 hereof.

(3) The Seller agrees at his sole expense to continue to care for and feed said steers in accordance with good ranching practice on his ranch near Irwin, Idaho, until called for by the Buyer as hereinafter provided, and to dehorn the same at his own expense at the proper dehorning time, and to deliver the same to the Buyer as hereinafter provided, free and clear of all liens and encumbrances of every kind and character. Seller's operations in connection with his caring for, feeding, and for dehorning said [6] cattle shall be subject to Buyer's inspection at any and all times, but Buyer assumes no responsibility in connection therewith.

(4) As and when called for by the Buyer, which shall be during the period from August 1, 1947, to October 1, 1947, the Seller agrees at his sole expense to deliver said three hundred (300) steers, and all of them to the buyer, F.O.B. Ogden, Utah. When delivered to the Buyer as aforesaid, the off car live weight of the same shall be determined, and

thereafter the same shall be slaughtered by the Buyer as soon as is reasonably possible in the orderly conduct of Buyer's business (the Buyer to be the sole judge thereof). Following the slaughter of the same they shall be graded in accordance with U. S. Department of Agriculture standards, and the dressed weight yield thereof, using approved packing house methods in determining the same, and by shrinking the warm weight three (3%) per cent, shall be ascertained, and the Buyer shall pay the Seller therefor at a price based on the dressed weight in accordance with which ever of the following formulas may be applicable:

A. For Those That Grade "A":

For all of said steers that grade "A" in accordance with the foregoing standards, the Buyer shall pay to the Seller as the full purchase price therefor, upon the basis of the total dressed weight thereof at the rate of 29.66 cents per pound dressed weight.

B. For Those That Grade in Excess of Grade "A":

For all of said steers that grade in excess of Grade "A" in accordance with the foregoing standards, the Buyer shall pay to the Seller, as the full purchase price therefor, upon the basis of 29.66 cents per pound dressed weight, plus the then difference in Buyer's market price per pound dressed weight between Grade "A" steers and the grade of such steers. For example: If at the time of slaughter, the Buyer's then market price for

grade [7] "AA" steers is two (2) cents a pound dressed weight higher than for grade "A" steers, the Buyer shall pay the seller for the "AA" steers 29.66 cents, plus 2 cents, or a total of 31.66 cents per pound, dressed weight.

C. For Those That Grade Less Than Grade "A":

For all of said steers that grade less than Grade "A" in accordance with the foregoing standards, the Buyer shall pay the Seller, as the purchase price therefor, upon the basis of 29.66 cents per pound dressed weight, less the then difference in Buyer's market price per pound dressed weight between grade "A" steers, and grade of such steers. For example: It at the time of slaughter the Buyer's then market price for grade "B" steers is two (2) cents a pound dressed weight less than for grade "A" steers, the Buyer shall pay the Seller for Grade "B" steers 29.66 cents, less two (2) cents, or a total of 27.66 cents per pound, dressed weight.

(5) It is understood that the Seller at this time has steers of the same type as those referred to herein in excess of the 300 hereby sold to the Buyer, and the Seller hereby guarantees delivery to the Buyer of the full count of 300 head, without any reservation, express or implied.

(6) Title to the aforesaid steers is to remain in the Seller until delivered to the Buyer as herein provided, and until so delivered they are held by the seller at his sole and exclusive risk and expense.

In witness whereof, the parties have hereunto set their hands this 4th day of November, 1946.

/s/ BERT RUDD,

Seller.

AMERICAN PACKING &
PROVISION CO.,

By /s/ E. W. FALLENTINE,

Its Vice President,

Buyer.

[Endorsed]: Filed Nov. 12, 1947. [8]

[Title of District Court and Cause.]

AMENDED ANSWER

Comes now the above named defendant and for his Amended Answer to the complaint of the plaintiff herein, admits, denies and alleges as follows:

I.

Defendant denies each and every allegation in said complaint contained, save and except as the same is hereinafter expressly admitted, qualified or explained.

II.

Admits paragraphs 1 and 2 of said complaint.

III.

Denies that the parties hereto made and entered into the contract described in paragraph 3 of said complaint and alleges that said purported contract never became effective or a valid and binding contract for the reason that the terms and conditions thereof were never agreed upon by the parties and

for the further reason that the same was never delivered, and in particular as follows:

(a) That after said alleged contract was signed by the defendant, it was transmitted by the defendant to the plaintiff through the United States mail with defendant's letter to the plaintiff accompanying same, wherein and whereby the defendant demanded of plaintiff that the provisions set forth in paragraph [9] 4 of said alleged contract providing for the shrinking of the warm weight of said cattle in the amount of 3% be eliminated from said alleged contract; that the delivery of said contract was a conditional delivery by the defendant to the plaintiff conditioned on the elimination of said provision from said contract; that the plaintiff did not at said time or at any other time accept said offer of defendant, or accept said conditional delivery of said contract, or agree to the elimination of said provision from said contract, and said alleged contract is not and never was in force or effect;

(b) That at the time said purported contract was signed by the parties, the defendant did not have 300 steers or any number whatsoever on his ranch, and did not have 300 steers or any number whatsoever, as described in said contract at any other place, or at all, all of which was at all times well known to the plaintiff, its agents, servants and employees, and it was understood and agreed that said purported contract was not to be in force or effect unless and until the defendant purchased cattle from other parties, which cattle, when and if obtained, the parties intended to make the subject matter of said contract but that, owing to no fault

on the part of the defendant, it was impossible for the defendant to purchase said cattle and by reason thereof said contract never was in force and effect.

IV.

Further answering said complaint and by way of further defense thereto:

Defendant denies that plaintiff has performed the conditions, stipulations and agreements of said alleged contract on plaintiff's part to be performed, and in particular, defendant alleges that the plaintiff failed and refused to pay the \$3,000.00 mentioned and described in said alleged contract as having been paid at the time of the execution thereof, and, by reason of such [10] failure on the part of plaintiff to pay such sum or any part thereof, there was a failure of consideration for said alleged contract and the same was rescinded and abandoned by the parties, and became, was, and is null and void.

V.

Further answering said complaint and as a further defense thereto:

Defendant alleges that after it became apparent that said cattle could not be obtained which defendant and plaintiff contemplated that defendant would purchase at the time said alleged contract was signed, and on or about the 8th day of December, 1946, the parties hereto entered into a new parol agreement under which plaintiff advanced to defendant the sum of \$3,000.00 to assist defendant in purchasing other cattle to be fed by defendant and sold and delivered to the plaintiff in the fall

of the year 1947; that defendant was unable to purchase cattle which would comply with the terms of said parol agreement and on or about the 11th day of September, 1947, defendant offered to return said \$3,000.00 to plaintiff with interest at the rate of six percent per annum, amounting to the sum of \$3,135.00, and defendant at all times since has been, and now is able, ready and willing to repay said amount to the plaintiff but that plaintiff refused, and still refuses to accept the same.

VI.

Further answering said complaint and by way of further defense thereto:

Defendant alleges that within the time provided for in the alleged contract described in plaintiff's complaint and notwithstanding that said contract had theretofore been rescinded and abandoned by the parties hereto, defendant offered to deliver to plaintiff 300 steers, but plaintiff refused to accept delivery thereof. [11]

Wherefore, defendant prays that plaintiff take nothing by this action and that defendant have and recover his costs and disbursements herein.

ALBAUGH, BLOEM, HILLMAN
ALBAUGH, BLOEM,

HILLMAN & BARNARD,
Attorneys for Defendant.

By /s/ RALPH L. ALBAUGH.

[Endorsed]: Filed May 25, 1948. [12]

[Title of District Court and Cause.]

TRANSCRIPT

This matter was tried May 25, 1948, before the Honorable William Healy, United States Circuit Judge, sitting at Pocatello, Idaho, without a jury.

Appearances: Messrs. Howell, Stine & Olmstead, Ogden, Utah; O. R. Baum, Esq., Pocatello, Idaho; Ben Peterson, Esq., Pocatello, Idaho; Milton Zener, Esq., Pocatello, Idaho, Attorneys for the Plaintiff. Messrs. Albaugh, Bloem, Hillman and Barnard, Idaho Falls, Idaho, Attorneys for the Defendant. [13*]

10 o'clock a.m. May 25, 1948

The Court: I think we better take up the motions first. I think there is a motion here to produce documentary evidence.

Mr. Albaugh: Also there is a motion to submit the case on the record. That is a motion by the plaintiff and we are resisting that. I think we should hear that motion first.

Mr. Olmstead: This motion by the plaintiff to submit the case to Your Honor for decision on the record made before Judge Brown, was filed by us, and as Mr. Albaugh states, is being resisted by the defendant. We conceive that under the law and under the rules there is a discretionary right to grant a new trial or to consider it upon the record previously made—

The Court: Without hearing from counsel on this motion I might say that I think it presents a situation somewhat analogous to a jury disagreeing,—a case being tried before a jury and the jury

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

disagreeing. I doubt that the matter could be presented on the former record. I might say further that as I understand this case, from the pleadings, there are many factual issues involved.

Mr. Albaugh: That is correct.

The Court: And I take it there will be considerable oral testimony. [16]

Mr. Albaugh: It was all oral testimony the last time.

The Court: It is of considerable assistance to the Court to have an opportunity to hear the witnesses and to see them and therefore I think that the motion of the plaintiff will be denied.

I understand there is an objection to the motion to file an amended answer, I will hear counsel on that.

(Whereupon the matter was presented to the Court by counsel.)

The Court: Is this the first amendment?

Mr. Albaugh: We amended by interlineation in paragraph 1, on page two as follows, adding the following words: "but that owing to no fault on the part of the defendant, it became impossible to obtain such cattle and by reason thereof said contract never became of force and effect." Paragraph two on page two of the answer was stricken and a paragraph inserted in lieu thereof, reading in the amendment, "that the plaintiff, on or about the 10th day of December, 1946, advanced the sum of \$3000.00 to enable the defendant to purchase cattle, but that it became impossible for the defendant to so purchase the same, due to no fault on the part of the defendant."

The Court: You have omitted certain of [17] the language of the former paragraph two; that is the only difference I see.

Mr. Albaugh: That is true, that was allowed by Judge Brown.

The Court: That is in your proposed amended answer?

Mr. Albaugh: Substantially the same.

The Court: In what paragraph?

Mr. Albaugh: Paragraph 5.

The Court: And subdivision B of paragraph three, it is elaborated on there.

Mr. Albaugh: That is substantially the same as paragraph 1 of page 2 of the original answer. That raises the same questions.

The Court: What about sub-paragraph A?

Mr. Albaugh: That is in explanation of the facts in connection with the alleged delivery or non-delivery of the contract.

The Court: Where do you set that up in the original answer?

Mr. Albaugh: In paragraph 3 page 1 of the original answer. That is the ultimate fact,—legal fact, now in sub-paragraph A it is set up in detail.

The Court: Paragraph four of the proposed amended answer, where do you have that in the original?

Mr. Albaugh: That in our opinion is in [18] our general denial. They allege that they performed everything by them to be performed and we deny that in the old answer. We also show payment of the \$3000.00 to purchase cattle but we do not admit either in the old answer or the new

that the \$3000.00 was advanced under this contract in suit here. The same question is raised in both answers.

The Court: I will hear from the plaintiff.

Mr. Olmstead: We object to paragraph five, particularly in that they are bringing in a new theory, they plead failure of consideration now and abandonment and rescision.

The Court: It seems to me that several of the matters that are included in the proposed amended answer might have been gone into although the language of the original answer is somewhat sketchy. As to paragraph five of the proposed amended answer I have some doubts whether it presents a substantial issue, but in view of the fact that this case is tried to the Court rather than to a jury and that you have gone over the ground once, my tendency is to permit this amendment for what it may be worth, and that will be the order, that the amendments are permitted. Do you wish to make a motion to make the answer more definite and certain? [19]

Mr. Olmstead: No we don't wish to make a motion.

The Court: You have once tried this case and I doubt very much that you would be surprised.

Mr. Olmstead: We didn't go into the question of a subsequent contract before Judge Brown. Now, Your Honor, there is a demand for this Company to produce certain records and we have a demand to produce a certain letter.

Mr. Albaugh: I think we have that letter. We don't deny that.

The Court: Then I understand that the demand will be met by counsel before this case is over.

Mr. Albaugh: Yes, Your Honor.

The Court: I have some difficulty in seeing the materiality of this evidence that you ask to be produced.

Mr. Barnard: The motion was made because of the procedure followed before Judge Brown. On the question of damages Judge Brown ruled that it was necessary for the plaintiff to show what they paid for cattle on the market when they claimed that this contract was breached and that they had to replace the cattle which they should have received under the contract by going on the market and buying cattle. As it developed in the trial the plaintiff did not produce any record to show what they purchased, but [20] said they purchased cattle at a certain price; we didn't think that was satisfactory. They are able to show the market price because plaintiff was buying cattle regularly upon the market, the Ogden market, and they have done for years. They have the records of the purchases of cattle during the time in question while they claim they were replacing the cattle they claim that had to be replaced. That is the purpose of the demand. If the plaintiff does have the records showing what they paid for cattle we think that record should be produced.

The Court: Of course, you don't limit your demand to steers comparable to those to be delivered under the contract.

Mr. Barnard: They are not identified sufficiently so that we can determine what they are.

The Court: Is it your position that the plaintiff was entitled to make demand for the cattle and that you did make demand?

Mr. Olmstead: Yes, sir.

The Court: Your view is that the market value has to be established as of the date of the demand?

Mr. Barnard: September 3rd or thereabouts, a few days one way or the other.

Mr. Olmstead: We went on the theory that where there is a market and the market value is shown——

The Court: ——that is the uniform sales [21] Act.

Mr. Olmstead: Yes,—we argued that the contract price was thus and so, and that the market was thus and so; we have established our damages as normally the difference between the contract price and the market price. Our position is that the damages is controlled and covered by the statute and these records are irrelevant and immaterial. Whether we went on the market or filled this contract from cattle on hand is immaterial.

Mr. Albaugh: I am inclined to think that the statement of the law made by counsel is a correct statement but Judge Brown followed the Montana line of decisions which is followed by Oklahoma and other states. Judge Brown took a position adverse to the plaintiff and the plaintiff then introduced evidence of what they paid for cattle.

The Court: What law do you gentlemen concede to be controlling. Are you agreed that the law of Utah or the law of Idaho is controlling here?

Mr. Olmstead: The law of Idaho.

The Court: Do you concede that?

Mr. Albaugh: I know of no difference, Utah has a uniform sales law.

The Court: The motion is very broad. It is not limited to the Ogden Market. The bearing these other documents would have on the market price at Ogden [22] and the question of damages would be very slight.

Mr. Barnard: I would like to amend the motion to limit the records to purchases made on the Ogden Market and also limit the time from August 26 to October first. The testimony of the previous case was that they were purchasing cattle until about November. I think it was the testimony of Mr. Fallentine. In any event during the time the delivery was called for under this contract. Perhaps this motion should be restricted to October, not later than that, and on the Ogden Market, we would like to limit our motion.

The Court: Are these records available?

Mr. Olmstead: They are available, all that they demanded.

The Court: The motion will be granted.

Mr. Olmstead: On the condition that we turn the whole **thing over to them**.

Now, Your Honor, do you want to make the record as to a new trial.

The Court: I don't take it that **this comes** as a new trial, but if you think so, then in view of the death of Judge Brown **prior to a decision and** the fact that there was received a large amount of oral testimony on the former trial, **it is ordered that**

the case be retried at this time. You may have an exception to that ruling. [23]

Mr. Olmstead: We have a large box of records covering all of the sales for this entire time. We have gone through our entire records and picked the ones we thought was covered by the demand. If we have to go through and separate them again it will take some time.

The Court: I think you can turn it over to the defendant and counsel can separate them and take what they want according to the order of the court.

If that is all on these motions we will proceed.

Mr. Olmstead: We will call Bert Ruud.

BERT RUUD

Called as a witness by the plaintiff, after being first duly sworn, testified as follows:

Cross-Examination

By Mr. Olmstead.

Mr. Olmstead: May the record show that I am calling the defendant as an adverse party in this action, which is permitted under the Federal Rules. The rules provide that he is called for cross-examination and that we are not bound by his testimony.

The Court: Very well.

Q. Your name is Bert Ruud. A. Yes, sir.

Q. You reside where, Mr. Ruud?

A. Irwin, Idaho.

Q. What is your occupation? [24]

A. Rancher.

Q. How long have you been engaged in ranching? A. Thirty years.

Q. What is the size of your ranch at Irwin, Idaho? A. About a thousand acres.

(Testimony of Bert Ruud.)

Q. Where is it located?

A. On the Snake River, in Bonneville County.

Q. How far from the Wyoming line?

A. I have some that joins the Wyoming line.

Q. So that your ranch is adjacent to and close to the Wyoming line, but on the Idaho side?

A. Yes, sir.

Q. Mr. Ruud will you examine exhibit 1 which is marked for identification, particularly the last page thereof and state whether or not your signature appears thereon? A. Yes, it does.

Q. I invite your attention to the writing in ink above the signature in connection with the date and I will ask you if you wrote the figure four after the word November,—no, the figure four in connection with the date, did you write that?

A. I cannot remember, just like I testified before, whether I did or not, I can't remember.

Q. Does it appear to be in your hand writing?

A. It looks like the same ink but I cannot say whether I wrote it or not. [25]

Q. Does it appear to be in your hand writing?

A. There is no writing just 4 and th.

Q. Now on the first page look at the writing following the word branded in the description and state whether you wrote the words O L Hip in that blank space? A. I think I did.

Q. At the time you placed your signature on that contract you inserted the brand description and then perhaps you dated the contract, is that correct? A. I think that is correct.

(Testimony of Bert Ruud.)

Q. What is the date the contract bears?

A. The 4th day of November, 1946.

Q. Would you say that you signed it on or about that date? A. I think I did.

Q. You think you did about that date.

A. Yes, sir.

Q. What did you do with the contract after you signed it?

A. I believe I mailed it to Mr. Louis Salerno.

Q. State who he is?

A. He is the agent dealing with me on buying the cattle.

Q. You know him as the cattle buyer for the plaintiff? A. Yes, sir.

Q. You think you sent it to him?

A. I am certain I did.

Q. At Ogden? [26]

A. I think I wrote a letter. There was a letter came with the contract from him and I included it with a letter back to him about things I didn't understand about the contract.

Q. This was November 4th.

A. I think the letter was dated November 3rd, and this is dated November 4th in the records here.

Q. What steers did you own at the time of signing that exhibit? A. None.

Q. Did I understand you to say none.

A. None on the ranch. This calls for steers on the ranch.

Q. How many did you own?

A. I probably had a few. I was buying and sell-

(Testimony of Bert Ruud.)

ing all of the time. I would have to search the records.

Q. Do you have such records?

A. I think I have sales records, I don't keep purchase records. I sold several cattle about that time.

Q. Mr. Ruud, what were the quality of the steers covered by that contract?

Mr. Albaugh: That is objected to as incompetent, irrelevant and immaterial, the contract speaks for itself, and it is not proper cross-examination.

The Court: Overruled.

A. We couldn't tell the quality until we had the cattle purchased.

Q. Do you recall the taking of your deposition in this case. I think it was on February 24, 1948?

A. I think I remember it. [27]

Q. Do you recall that occasion?

A. Yes, sir.

Q. Do you recall in the course of the taking of that deposition you were asked "what kind of cattle were you selling under the terms of this contract to the packing company"? You answered: "The original deal as we drew it up, would have been good cattle, had we completed the deal." Do you recall giving that answer? A. Yes, sir.

Mr. Albaugh: I move to strike that for the purpose of making the objection, and I object for the reason that it is an attempt to vary the terms of a written contract. There is an attempt to reform the contract and the testimony is not admissible unless

(Testimony of Bert Ruud.)

it is pleaded. They must plead and show a prior agreement. Before this testimony can go in there must be a pleading.

(Further argument of counsel not reported.)

The Court: This contract is in a measure ambiguous. I think the objection will be overruled.

Q. Do you recall making that answer that the steers were good quality.

A. I would try to buy good quality steers.

Q. Do you recall answering in your deposition that the steers covered by the contract were good quality steers?

Mr. Albaugh: I object to this method and [28] manner of questioning a witness on a deposition. I ask that the deposition be handed to the witness, and I make the further objection that it is improper cross-examination.

The Court: I think he should be given a copy of the deposition, and the objection that it is improper cross-examination is overruled.

Q. Refer to page 28 of the deposition, and the answer I am referring to is the fourth answer from the bottom of the page.

A. May I ask a question.

Mr. Olmstead: Just answer the question, Mr. Ruud.

Q. At the time you gave this deposition, you made that answer.

A. It says here "A good quality," does that mean a good quality or good quality.

The Court: The letter A probably stands for answer.

(Testimony of Bert Ruud.)

A. I said "that's right."

Q. Read the answer above that: "The original deal as we drew it" and so forth.

A. "The original deal as we drew it up, would have been good cattle, had we completed the deal."

Q. Is that your answer at the time of taking the deposition? A. Yes, sir. [29]

Q. What were the weights of the cattle at that time?

Mr. Albaugh: I renew my objection, it is incompetent, irrelevant and immaterial and it is an attempt to vary the terms of a written contract.

Q. The question in the deposition is "What size of cattle."

Mr. Albaugh: Now I make the objection.

The Court: Objection overruled. I might state that it is my inclination to admit the evidence rather freely and counsel may make their objection, and you can specifically point out these matters to the Court either in argument of briefs.

Mr. Albaugh: May it be understood that my objection goes to this line of questioning concerning the cattle, and any oral agreement, or would the Court prefer that I make the objections as the questions are asked?

The Court: For the present I would prefer the latter procedure.

A. Yes, I answered that, I said about five hundred.

Q. Five hundred and twenty-five pounds.

A. Yes, I just didn't turn the page to see the twenty-five.

(Testimony of Bert Ruud.)

Q. Now, Mr. Ruud, in the course of your ranching operation prior to the making of this contract you had fed a good quality of cattle on your ranch?

Mr. Albaugh: Objected to as incompetent, irrelevant and immaterial and not proper cross-examination.

The Court: Overruled. [30]

A. I have fed all kinds of cattle and all sizes.

Q. Including good cattle? A. Yes.

Q. Will you examine exhibit 2 and state what it is?

A. This is a letter that I explained to——

A. No, not what it contains, just state what it is, Mr. Ruud. A. It is a letter.

Q. What is the date of that letter?

A. November 3.

Q. November 3, 1946? A. Yes, sir.

Q. Is that the letter you forwarded to Mr. Salerno at the time you sent the contract?

A. Yes, sir.

Mr. Olmstead: Now, if the Court please, I have proved one signature to that contract, may I ask the witness to step down so that I may prove the other signature?

Mr. Albaugh: We admit that it is Mr. Fallentine's signature, and that he is the vice president and General Manager of the plaintiff corporation.

Mr. Olmstead: I think we offer this exhibit now,—exhibit 2.

The Court: Do you have any objection.

(Testimony of Bert Ruud.)

Mr. Olmstead: I beg the Court's pardon, it is exhibit 1, the contract I am offering at this time. [31]

Mr. Albaugh: I would like to question the witness on the letter.

The Court: Letter from whom to whom?

Mr. Albaugh: Mr. Ruud to Mr. Salerno.

The Court: Very well.

Q. (By Mr. Albaugh): Did this accompany the contract that you mailed to Mr. Salerno?

A. Yes, I think it did, the contract is dated the 4th and this is dated the 3rd but it runs in my mind that I sent them both at the same time.

Q. Just look at the letter to refresh your mind, Mr. Ruud, read the first portion of that letter.

A. Yes, it says I am inclosing the contract.

Q. That was mailed with the contract?

A. Yes, sir.

Mr. Albaugh: At this time if the Court please, we offer exhibit 2.

The Court: Does the plaintiff have any objection.

Mr. Olmstead: None.

The Court: That may be admitted.

(Testimony of Bert Ruud.)

DEFENDANT'S EXHIBIT NO. 2

Irwin, Idaho, Nov. 3, '46.

Louie Salerno,
Ogden, Utah.

Dear Sir;

I am enclosing the contract signed but would like the place in paragraph four (4) where you recite that you will shrink the warm carcass 33%.

three percent as this part of our verbal agreement was not agreed on and if this was allowed and me deliver cattle to plant it would amount to roughly \$10, per head and the yield would be lowered to cut the price also.

As I understand the price of 29.66 on a yield of 59 will also apply to a yield of higher or lower as we agreed on that is if the cattle yield 60 the price would raise according and if they yield 58 the price will be lower the same way.

I will sign the contracts but kindly erase the 3% shrink on hot weight as this will cost me roughly \$6. per head and I think that I should be allowed hot weight when I deliver the cattle and guarantee 59 and A Grade and I also have the best bunch of steers I ever fed Have sorted all the rough ones and large off steers out have two bunches to receive but the snow storm delayed some but will get them soon.

Kindly sign the Copy and mail check to me at Irwin when and if you can at once I may be at the

(Testimony of Bert Ruud.)

Falls Wed and you can hand it to me there will be at Jackson with the cattle untill then.

Yours truly

/s/ BERT RUUD.

I think I should hear your objection on the admission of the contract. You may go ahead with your objection.

Mr. Albaugh: We object to exhibit 1 for the reason that the letter accompanying the [32] contract shows on its face that there was no meeting of the minds at that time; that the contract was not to take effect at that time; that there was no legal delivery only manual delivery of the contract. The law is well settled that when a letter accompanies a contract it becomes a part of the contract, they are read together and this letter shows that there was no legal delivery of the contract. The contract was not in effect and not to take effect until certain alterations were made, the letter recites: "I am inclosing the contract signed but would like to place in paragraph four where you recite that you will shrink the warm carcas three per cent as this is part of our verbal agreement was not agreed on and if this was allowed and me deliver cattle to plant it would amount to roughly ten dollars per head and the yield would be lowered to cut the price also." Then in the next to the last paragraph it says: "I will sign the contracts but kindly erase the three per cent shrink on hot weight as this will cost me roughly \$6.00 per head and I think that I should be allowed hot weight when I deliver the

(Testimony of Bert Ruud.)

cattle and guarantee fifty-nine and A grade." I have plenty of authorities on that point.

The Court: I think that presents a question of law that you may argue in due time, but for the present I will admit the contract.

Q. The contract provided for a basic price of \$29.66 dressed [33] weight following slaughtering?

Mr. Albaugh: We object to this as not the best evidence. The contract would be the best evidence.

The Court: Overruled.

Q. You recall that?

A. Yes, sir,—may I explain.

Q. Was that arrived at from a basic live-weight figure?

A. It was arrived at as you drew it up.

Q. Was it arrived at from a live-weight figure?

A. I don't know how you computed it. It was the way you wrote it up. The original deal was 17 and a half a pound.

Q. The live-weight was seventeen and a half cents a pound? A. Yes, sir.

Q. And that was converted into dressed weight price in the contract?

A. That is your theory, I had nothing to do with that.

Q. Then I understand that your idea was that the price of the cattle was seventeen and a half cents per pound live-weight? A. Yes, sir.

Mr. Albaugh: I object to this as incompetent, irrelevant and immaterial and not proper cross-examination.

(Testimony of Bert Ruud.)

The Court: Objection is overruled. It is explanatory of the situation.

Q. Do you know anything about the percentage of dressed weight yield compared to live-weight in relation to the various types and weights of cattle? [34]

Mr. Albaugh: Objected to as not proper cross-examination.

The Court: Overruled.

A. I cannot say that I do.

Q. Have you had an experience in determination of dressed weight yield to live-weight.

A. This is the only such deal I ever got into and they tried to explain it to me.

Q. You have sold cattle on a dressed weight basis?

A. I have bought cattle for different packers and they have explained it, but not my own cattle.

Q. You don't know what a normal good quality steer would dress out?

A. I would not be an expert.

Mr. Olmstead: That is all.

Mr. Albaugh: No questions at this time.

Mr. Olmstead: There are a few more questions if I may go ahead.

The Court: Very well.

Q. (By Mr. Olmstead): The cattle that were covered by the contract were cattle which were to be fed by you until ultimately they were delivered to the Packing Company.

Mr. Albaugh: Objected to as incompetent, ir-

(Testimony of Bert Ruud.)

relevant and immaterial and not proper cross-examination. It is also an attempt to vary the terms of the contract. [35]

The Court: Overruled.

A. They were to be pastured by me.

Q. They were what is normally known as feeder steers.

Mr. Albaugh: Objected to as incompetent, irrelevant and immaterial, not proper cross-examination and an attempt to vary the terms of the written contract. It is not competent under the pleadings in this case.

The Court: It is quite obvious they were feeder steers. Overruled.

A. They were steers that we could buy to fill the contract. The contract says steers.

Q. And then you were to feed until delivery to the packing company next fall.

A. I didn't have a feeding plant, I have a pasture.

Q. Then you were to maintain a pasture and pasture them? A. That is right.

Q. Under normal feeding conditions, taking good quality steers in November, 1946, weighing approximately five hundred twenty-five pounds, what would those steers have weighed at the time of delivery to the packing company in August or September, 1947?

Mr. Albaugh: Objected to as incompetent, irrelevant and immaterial and not proper cross-examination. No foundation is laid for it.

(Testimony of Bert Ruud.)

The Court: It calls for the weight under normal conditions, that is the way the question is framed, under normal conditions I think it should refer to the conditions under this contract.

Mr. Olmstead: May I reframe the question?

The Court: Yes.

Q. Under conditions which existed upon your ranch for the growing, pasturing and maintaining of cattle what would steers weighing 525 pounds in November, 1946, have weighed as a consequence of your maintaining and caring for them on your ranch in August or September, 1947?

Mr. Albaugh: May the same objection made to the last question show as applying to this question.

The Court: Yes.

A. That would depend on two things. Had I purchased the cattle at one place they might have weighed more than if I had purchased them and fed them at another. They might have weighed less in Montana. They generally gain enough to pay for their feed. If I buy a five hundred pound animal he may weigh six hundred in the spring; in the pasture I may put on a hundred and fifty pounds.

The Court: This contract provides that you will care for the steers in accordance with good ranching practice on your ranch at Irwin, Idaho, now, answer that question.

A. They gain approximately a hundred fifty pounds on my ranch, they do that every year.

Q. Maintaining steers of the type and quality mentioned, on that ranch from November, 1946,

(Testimony of Bert Ruud.)

until August, 1947, then, the [37] gain would be a hundred fifty pounds?

A. On my ranch, yes.

Q. On your ranch. A. Yes, sir.

Q. Do you recall at the time of the taking of the deposition you said that you had in mind filling this contract with so called Peterson cattle?

Mr. Albaugh: What page is that?

Mr. Olmstead: I am turning to page 32 now.

A. Yes, sir.

Q. Do you recall at that time that you testified that these cattle, under normal conditions being conditions such as you had in mind, would have weighed nine hundred pounds at the time of delivery to the Packing Company?

Mr. Albaugh: Objected to as incompetent, irrelevant and immaterial and not proper cross-examination and also an attempt to vary the terms of a written contract,—an effort to explain and modify the contract and there being no pleadings upon which to base such evidence.

The Court: Overruled.

A. What line is that on?

Q. That is the third question from the top of the page and your answer: "Under normal conditions, such as you as you had in mind"—Now what would those conditions be?

A. Well, on that deal had it been completed they were to [38] feed the cattle during the winter and I was to feed them during the summer. That is the deal on the Montana cattle.

(Testimony of Bert Ruud.)

Q. They are the cattle you had in mind at that time to fill the contract with?

Mr. Albaugh: Objected to as incompetent, irrelevant and immaterial and not proper cross-examination, and it is an attempt to explain this written contract.

The Court: Overruled.

A. Those were the cattle that I was trying to buy.

Q. To fill this contract? A. Yes, sir.

Q. And those would have weighed nine hundred pounds at that time.

A. Had they had a good winter, yes, I think they would have done that.

Mr. Olmstead: That is all.

Redirect Examination

By Mr. Albaugh.

Q. When you said they would gain a hundred and fifty pounds on your ranch, that was confusing, can you explain that?

A. We live in a snow country. We have three months of Summer and we have a good pasture during that three months, we keep them during that time and after that the grass freezes.

Q. Do you have hay to feed three hundred steers?

A. No, we never keep them there, they couldn't be fed there.

Q. You set this gain up to nine hundred pounds and then said they gained or would gain a hundred and fifty pounds on [39] the ranch, how do you figure that winter gain in Montana?

(Testimony of Bert Ruud.)

A. That would be for six months on hay against three months on grass.

Q. Had Mr. Salerno been on your ranch in the Fall of 1936?

A. Yes, he had been there to look at some fat cattle that I was trying to sell him.

Q. Did Mr. Salerno know you had no feed on your ranch? A. Yes, sir.

Q. And did he know you had no cattle there at the time the contract was signed?

A. Yes, I spoke to him, and at the time the contract was signed he said he knew that there was no cattle on the ranch.

Q. He knew that. A. Yes, sir.

Mr. Albaugh: That is all at this time.

Mr. Olmstead: That is all.

J. J. SMITH

Called as a witness on the part of the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

By Judge Baum.

Q. You reside where, Mr. Smith?

A. Idaho Falls, Idaho.

The Court: May I ask if this deposition which has been referred to is in evidence?

Mr. Albaugh: None of the depositions are. [40]

Judge Baum: They were published but not in evidence.

Q. What business are you in, Mr. Smith?

A. Brand inspector.

Q. For whom?

(Testimony of J. J. Smith.)

A. The states of Montana and Wyoming.

Q. Where do you maintain your office?

A. Helena, Montana, and Cheyenne, Wyoming.

Q. Your local office. A. Idaho Falls, Idaho.

Q. Do you have an office there?

A. Yes, sir.

Q. Carrying on business for your employers at that point? A. Yes, sir.

Q. Are you acquainted with Bert Ruud, the defendant in this case? A. Yes, sir.

Q. How long have you been acquainted with him? A. Probably six years.

Q. Are you acquainted with his ranch near Irwin, Idaho? A. Yes, sir.

Q. Have you been on it? A. Yes, sir.

Q. Were you acquainted with it in the late Summer of 1947? A. Yes, sir.

Q. And were you there at that time?

A. Yes, sir. [41]

Q. Did you see any livestock there on the ranch at that time?

A. Yes there was stock there.

Q. Some steers. A. Yes, sir.

Q. How many head?

A. Around two hundred and ninety or three hundred head.

Q. Do you know the quality of those cattle you saw? A. Yes, sir.

Q. How long have you handled and inspected cattle?

A. How long have I been inspecting cattle?

Q. Yes.

(Testimony of J. J. Smith.)

A. Twenty years or so, and maybe twenty-five.

Q. During these twenty years what has been your general occupation?

A. Inspecting cattle for brands mostly.

Q. Did you note any brands on those cattle you saw on Ruud's ranch? A. Yes, sir.

Q. Now, Mr. Smith, did you later see some of those cattle? A. Yes, sir.

Q. And where was that?

A. At the Idaho Falls Market.

Q. Do you recall when that was?

A. I have the date but I don't just remember it now. I have the date that I seen them.

Q. Was it in the Fall of 1947, along about August? A. Yes. [42]

Q. How were they branded,—the cattle you saw there?

A. I believe the ones that came in August O V O left hip.

Q. Do you know what those cattle weighed?

A. No, sir, I don't.

Q. Are you in a position to give your opinion as to the weight of those cattle in the Idaho Falls yard at that time?

Mr. Barnard: We object to that as incompetent, irrelevant and immaterial unless we know whether these cattle are claimed to be the subject matter of the contract. The testimony shows that Mr. Ruud buys and sells cattle all of the time. We don't know whether they claim these cattle had any connection with the contract or the subject matter of the contract.

The Court: Objection overruled.

(Testimony of J. J. Smith.)

A. I would say they weighed around nine hundred thirty pounds; that is my opinion.

Q. In whose name were those cattle sold that you saw at Idaho Falls stock yard. Those nine cattle I am speaking of now.

A. Bruce Porter, Jackson, Wyoming.

Q. Who was Bruce Porter? Was he a cattle man?

A. He is a producer of livestock who also has a Drugstore.

Q. What association or whose yard was it that you saw these cattle handled in, in August, 1947, in Idaho Falls?

A. The Idaho Livestock Auction Company.

Q. Now, what was the quality of these cattle?

A. Very good quality steers. [43]

The Court: Did you say they were steers that belonged to Mr. Porter?

A. They were in Mr. Porter's name.

Q. Did you have any conversation with the defendant in reference to the nine head of cattle at that time? A. Yes, sir.

Q. State where that conversation occurred?

A. Close to my office in the yard.

Q. Who else was present? A. I don't recall.

Q. What did Mr. Ruud say to you at that time, with reference to those nine head of cattle?

A. He said he purchased them from Mr. Porter some time before and to send the money to Porter, that he had mislaid the Bill of sale, and for me to let the money go on to Porter and then Porter would later send it to him. He said that Porter was the former owner of the cattle.

(Testimony of J. J. Smith.)

Q. How did you handle the money at that time. How did you mark it,—I mean does the association or company pay out money to people in Wyoming until you O. K. the sale? A. No, they don't.

Q. What did you do?

A. I held the check for some time and later got the bill of sale given by Porter to Ruud.

Q. That is Mr. Ruud the defendant here?

A. Yes, sir. [44]

Q. Then what happened?

Mr. Albaugh: Objected to as incompetent, irrelevant and immaterial. There is no connection shown between these cattle branded O V O and the cattle covered by this contract?

The Court: Overruled.

(No answer was made to the question.)

Q. When you were talking to Mr. Ruud who did Mr. Ruud say the 9 cattle belonged to?

A. That they belonged to him but were carrying Mr. Porter's brand. They belonged to Mr. Ruud, that is what he told me.

Q. Did you see this exhibit before?

A. Yes, at the former trial here.

Q. Did you see it in August, 1947?

A. No, I don't know that I did. Oh. I imagine that I did, yes, I imagine I have.

Q. What did you do with the cattle Mr. Smith?

A. We let them sell the cattle and held the proceeds of the sale. We don't hold any cattle; we let them sell the cattle and hold the proceeds.

Q. Will you look at Exhibit 7 and state whether

(Testimony of J. J. Smith.)

you ever saw that before? A. Yes, I have.

Q. What is it? [45] A. A check.

Q. Where did you see that check?

A. When I put a hold on this money. That is attached there and kept there until it is mailed out to whoever we may give the proceeds to.

Q. Is that check in payment for these nine head of cattle? A. Yes, sir.

Q. Whose endorsement is on the back of that check?

Mr. Albaugh: Objected to as not being the best evidence. The check would be the best evidence.

The Court: Overruled. He may answer if he knows.

A. Bruce Porter had endorsed this check?

Q. Who else? A. Mr. Max Ruud.

Judge Baum: We move the admission of exhibits six and seven.

Mr. Albaugh: We object as they don't tend to prove any issues in this case. There is no connection between the exhibits and the cattle described in the contract. We don't know that the plaintiff is claiming these cattle were covered by the contract. They are incompetent, irrelevant and immaterial at the present time.

The Court: Overruled.

The Clerk: Do you gentlemen want these marked exhibits 2 and 3? [46]

Mr. Olmstead: Exhibit Number 6 will be marked as number three now, and exhibit 7 will be marked number four, is that right?

The Court: That is right.

(Testimony of J. J. Smith.)

PLAINTIFF'S EXHIBIT No. 3

[Idaho Livestock Auction Co. Statement]

9 Idaho Falls, Idaho, 8/6/1947

Sold for Account and Risk of: Bruce Porter, P.O. Jackson, Wyo.

Cattle	Description	Price	Weight	Purchaser	Amount
8	Wf Strs.	23.90	8150	American 8	\$1,947.85
1	Wf Str.	25.40	1185	American 8	300.99
9			9335		

\$2,248.84

Truck or Freight, including Charges on Road.....\$28.00

Commission 15.75

Brand Inspection90 44.65

Net Proceeds.....\$2,204.19

Check to Hold No. 8293

PLAINTIFF'S EXHIBIT No. 4

IDAHO LIVESTOCK AUCTION CO.

No. 8293

Custodian Account for Shippers Proceeds

Idaho Falls, Idaho, Aug. 6, 1947

Pay to the Order of BRUCE PORTER.....\$2204.19

When the warranty endorsement on reverse side hereof is properly
executed. (This draft not valid if endorsement is altered)

Idaho Livestock Auction Co.....\$2204 Dols 19 cts

Market Agency Account

By /s/ O. I. BLAIN

To Bank of Eastern Idaho

Idaho Falls, Idaho

By endorsing this instrument payee warrants that the livestock paid
for hereby was owned by me/us free of all incumbrances when
delivered to and sold for my/our account[Signed] BRUCE PORTER
Seller

[Signed] MAX RUUD

(Testimony of J. J. Smith.)

Q. Mr. Smith, do you know the territory in which the ranch of Mr. Ruud is located?

A. Yes, sir.

Q. Is that deemed to be good cattle country?

A. Yes, it is.

Judge Baum: That is all. You may examine.

Cross-Examination

By Mr. Albaugh:

Q. Does Mr. Ruud ordinarily use his ranch for pasture or for grain and hay, do you know?

A. What I noticed of it, he has been pasturing it quite a little.

Q. Now, this O V A on the left hip or the left ribs, whose brand is that?

A. Bruce Porter of Jackson, Wyoming.

Q. That is a Wyoming registered brand, I assume?

A. That is right.

Q. I believe you stated on your direct examination that these nine head weighed about 930 pounds?

A. Yes, that was my opinion, I didn't pay any attention to the weight; that is not my business.

Q. Exhibit number 3 shows these nine cattle weight to be 9335 pounds, do you remember that from the exhibit?

A. I didn't check it up.

Mr. Albaugh: Will you please show the exhibit to the witness, Mr. Bailiff.

(Testimony of J. J. Smith.)

Q. Now, Mr. Smith, I am trying to show whether these are the same nine cattle that are shown as weighing 9335 pounds are the ones you estimated would weigh nine hundred and thirty pounds?

A. Those are the same cattle.

Q. You estimated they would weigh 930 apiece.

A. Yes, sir, the same ones.

Q. One head weighed 1185 pounds, I think.

A. It shows that.

Q. Do you know who this draft for the nine head was paid to?

A. Do I know what?

Q. The payment for these nine head of cattle shown on the exhibit, do you know where the proceeds went?

A. Yes, sir,—well, I don't know where it went but I ordered the Livestock Company to clear the proceeds, that they could send it to Porter or Mr. Ruud. Mr. Ruud furnished a bill of sale and the check was in the name of Porter.

Q. How long did it take Max Ruud to get that Bill of Sale?

A. I didn't have anything to do with Max Ruud.

Q. Well, Mr. Ruud here.

A. I don't know,—I don't remember that.

Q. But you tied up the sale until he got the bill of sale from Porter, from Bruce Porter?

A. Yes, sir.

Q. And he got a new bill of sale?

A. Or found his old one, I don't know which.

(Testimony of J. J. Smith.)

Q. You don't know whether he got a new one or not? A. No, sir.

Q. Was there any brand O left hip on these cattle you saw?

A. No, sir, not on the nine head.

Q. Or any other cattle on Ruud's ranch?

A. No, sir.

Q. Did you ever see any cattle branded O left hip on his ranch at any time?

A. No, sir, I didn't.

Mr. Albaugh: That is all.

The Court: We will recess until 2 this afternoon.

2 o'Clock P.M., May 25, 1948

Judge Baum: I would like to ask the witness Smith a few more questions.

Mr. Albaugh: No objections from us.

The Court: Very well.

Q. Now, Mr. Smith, you are the same gentleman who testified [49] before lunch?

A. Yes, sir.

Q. After observing these nine head of cattle that you referred to in your testimony this morning, at the time you saw them in Idaho Falls,—did you afterward go over to Jackson?

A. Yes, sir.

Q. Did you there see a man named Bruce Porter? A. Yes, sir.

Q. Did you return to Idaho Falls after that?

A. Yes, sir.

Q. And upon your return did you see Mr. Ruud? A. Yes.

(Testimony of J. J. Smith.)

Q. Did you have another conversation with Ruud with reference to these nine head of cattle?

A. Yes, sir.

Q. State to the Court that conversation.

A. It seemed that the bill of sale of these cattle and the title as I remember, Mr. Ruud said that these cattle belonged to his son and they were not a part of the cattle that he had under contract to the American Pack.

Q. What else did he say in reference to the cattle under contract to the American Pack.

A. He said he had some on the ranch,—that they were back on the ranch or something of that kind. [50]

Q. This conversation occurred shortly after you held up the check on the nine head of cattle?

A. Yes, sir.

Judge Baum: That is all.

Mr. Albaugh: No further questions.

ORLAND ROBERTSON,

being called as a witness on the part of the plaintiff, after being first duly sworn, testified as follows:

Direct Examination

By Judge Baum:

Q. Where do you reside?

A. Jackson Hole, Wyoming.

Q. How long have you resided in Jackson Hole?

A. Twenty-three years.

Q. What business are you in?

A. Ranch work.

(Testimony of Orland Robertson.)

Q. Does that include the caring for cattle?

A. Yes, sir.

Q. Are you acquainted with Mr. Bert Ruud?

A. Yes.

Q. When did you first meet him?

A. Did you say where did I meet him or when did I meet him?

Q. When did you first meet him?

A. The latter part of October, 1946.

Q. Where? [51]

A. At the Wort Hotel.

Q. In Jackson?

A. Yes, in Jackson, Wyoming.

Q. Who was present at that time?

A. Mr. Ruud and myself.

Q. Did you have a conversation with Mr. Ruud at that time? A. Yes, sir.

Q. As a result of that conversation did you go to work for Mr. Ruud? A. Yes, sir.

Q. When did you start to work for him?

A. Around the 8th or 10th of November, 1946.

Q. What type of work were you doing?

A. Feeding steers.

Q. Feeding steers? A. Yes, sir.

Q. Where were you feeding these steers?

A. At the Elk Ranch, west of Moran, Wyoming.

Q. What was said and done at that conversation? A. Pardon me.

Q. What was that conversation, the conversation you had with Mr. Ruud?

A. At the hotel?

(Testimony of Orland Robertson.)

Q. Yes.

A. He wanted me to feed steers for the winter and we made [52] arrangements for when I came back from a trip to Idaho.

Q. You were going to make a trip to Idaho?

A. Yes.

Q. When you came back from the trip to Idaho did you have a further conversation with him?

A. Yes, sir.

Q. When was that?

A. The 8th or 10th of November.

Q. 1946? A. Yes, sir.

Q. What was that conversation?

A. He told me the amount of steers that was there because he had that contract to deliver next fall and he wanted to put gain on them, and he told me how they were marked.

Q. How did he say they were marked?

A. With green paint with an O on the left hip.

Q. How many head did he say he had?

A. 218 head.

Q. What else did he say?

A. I can't remember much else that was said.

Q. As a result of that conversation when did you start to work for him?

A. The last conversation?

Q. Yes. A. I fed that day. [53]

Q. Where was that last conversation?

A. The Elk Ranch.

Q. Did you find some cattle there that day?

A. Yes, sir.

(Testimony of Orland Robertson.)

Q. How many? A. 218 head.

Q. Did he say where he obtained those cattle?

A. Local people, Mrs. Grismer; Wayne Ricks and cattle from the Pinedale country.

Q. How were those cattle branded?

A. Fifty or sixty had the Bruce Porter brand O V A, and the Ricks brand Bar Dash Bar.

Q. What other brands did they have?

A. They had the green paint.

Q. Did Mr. Ruud tell you when that brand was put on them?

A. It had been put on just before he moved them to the Elk Ranch.

Q. Did he tell you where he was moving the cattle from? A. South of Jackson.

Q. Who did he say put the brand on?

A. He himself but I don't know who did.

Q. Did that brand appear fresh or was it an old brand? A. It was fresh.

Q. How many had the O V A on?

A. Sixty or seventy head.

Q. When you first observed these cattle,—strike that,— [54]

Q. You handled those for how long?

A. Twenty-eight or thirty days.

Q. During that period you observed them how often. A. Twice a day.

Q. You observed them twice a day during that period? A. Yes, sir, twice a day.

Q. What would you say they would weigh at that time? A. From 625 to 750 pounds.

(Testimony of Orland Robertson.)

Q. And were they good quality?

A. Good quality.

Q. And their approximate age?

A. Long yearlings.

Q. You worked there how long?

A. In November.

Q. When did you see the cattle last?

A. The latter part of December or the first of January.

Q. Have you an opinion as to what those cattle would weigh in the fall of 1947 if they were properly cared for on the ranch?

Mr. Albaugh: We object to that as incompetent, irrelevant and immaterial.

The Court: He may answer this question.

A. Yes, sir.

Q. State what that opinion is.

Mr. Albaugh: Now we object to this as the witness is not shown to be qualified. [55]

The Court: Objection sustained, let's hear more about this witness.

Q. For a few years ahead of this time you worked for Mr. Ruud, what had you been doing?

A. Working around ranches, feeding cattle.

Q. Did they raise cattle on those ranches where you worked?

A. Yes, sir.

Q. What other work did you do?

A. General farm work.

Q. Are you acquainted with the Irwin, Idaho, section of the country?

A. Just been through there.

(Testimony of Orland Robertson.)

Q. How far is that from Jackson Hole?

A. I don't rightly know.

Q. Approximately?

A. Fifty or sixty miles.

Q. What other work did you do prior to this work with Mr. Ruud? Did you ever weigh cattle?

A. Yes, I did.

Q. Where was that?

A. That was at Victor, Idaho, mostly. I was with the Mosley cattle; that was before I went to the service, I took small bunches out.

Q. Were you ever around the market when cattle were sold? A. Yes, sir. [56]

Q. And observed those cattle?

A. Yes, sir.

Q. And that covered a period of how many years? A. Ten years.

The Court: How old are you?

A. Twenty-three.

Q. Can you give an opinion as to those cattle,—what they would have weighed,—strike that, please,—can you give an opinion as to what those particular cattle that you fed in the fall of 1946, if they had been carried through the following summer in good ranch-like manner, would have weighed in the Fall of 1947?

Mr. Albaugh: Objected to as too general and no foundation laid. It is not shown that the witness is qualified to answer.

The Court: Overruled.

A. Yes.

(Testimony of Orland Robertson.)

Q. In August or September, 1947.

A. Approximately 925 to 1000 pounds.

Judge Baum: You may take the witness.

Cross-Examination

By Mr. Albaugh:

Q. When did you have that conversation in the Wort Hotel with Mr. Ruud? [57]

A. I don't remember the date. It was the latter part of October, 1946.

Q. Later part of October? A. Yes, sir.

Q. What time of the day was that?

A. That was at night.

Q. You were looking for a job?

A. I had a job. The fellow I was working for, the foreman of the Mosley outfit, knew Ruud needed a man and he was going to lend me to him for the winter.

Q. Moran is north of Jackson? A. Yes.

Q. About how far?

A. Thirty-three miles.

Q. These cattle were moved from south of Jackson to Moran? A. Yes, sir.

Q. How far would you say, forty or fifty miles?

A. Not over thirty-five.

Q. Some were moved from Pinedale?

A. They were trucked so far as I know.

Q. Did you help move the cattle?

A. No, sir.

Q. How long will paint show up on the cattle?

A. Not very long in a country with lots of storm.

(Testimony of Orland Robertson.)

Q. Three or four days? [58]

A. Oh, three or four months, it will show up three or four months.

Q. Isn't it true that on some cattle it will all be off in three or four days?

A. It will show up for that time.

Q. Paint is not used as a brand, is it?

A. That is the first I saw it.

Q. Have you known of it being used in moving cattle, to identify them from other cattle?

A. I never saw it used before.

Q. You say they were long yearlings, how old would they be, if you know?

A. Calves in the spring of 1945.

Q. Eighteen to twenty months old?

A. April or May calves and that was along in November that I saw them.

Q. You say that there were two hundred and eighteen head all together? A. Yes, sir.

Q. Did that include the sixty or seventy O. V. A. cattle? A. Yes.

Q. And did they have paint on them?

A. Yes.

Q. Did you make a record of the other brands?

A. I know those brands were there, with other ones but now [59] I can't remember them. I know the people's brand but right now I can't tell their brands.

Q. How big was this paint brand on those cattle?

A. The size of the bottom of a beer bottle.

(Testimony of Orland Robertson.)

Q. Isn't it a fact that the bottom of a beer bottle was dipped in the paint and dobbed on the cattle? A. That is what I was told.

Q. And it made more of a smudge than a brand?

A. More of an 'O'.

Q. It was more of a smudge than an O.

A. It was meant to be an O, you could see that.

Q. Was it on the left hip of all of them or some on the side?

A. So far as I remember it was all on the left hip.

Q. You didn't see that paint put on there with the beer bottle, did you? A. No, sir.

Q. You never ran the cattle down to Irwin, Idaho? A. No, sir.

Q. Now, what cattle would weigh would depend on the season, as to whether it is a wet or dry season.

A. The season we had last year——

Q. ——Just answer the question.

A. Yes, sir.

Q. And on how many cattle there was per acre, and how good the feed was? A. Yes. [60]

Q. Those cattle were kept in Jackson Hole all winter? A. Yes, sir.

Q. You fed them?

A. For twenty-eight to thirty days I fed them.

Q. How long did they stay in Jackson Hole?

A. They were taken out in the spring afterward, I don't know the date or the month, but it was after feeding was over.

(Testimony of Orland Robertson.)

Q. Probably about May, 1947?

A. Probably so.

Q. Did you help take them out?

A. No, sir.

Q. Now, isn't it a fact, Mr. Robertson, that in trailing those cattle from south of Jackson forty or fifty miles to Moran those cattle had to trail through other cattle with the same brand?

A. No, sir.

Q. Aren't there other cattle in Jackson Hole with the same brand?

A. Yes, but they would not have to trail through them.

Q. Why not?

A. Because the cattle with the same brand were in the fields at that time, the lanes were fenced where they moved the cattle.

Q. Isn't it true that in Jackson Hole there are cattle out [61] in the road at all times of the year?

A. Not at that time.

Q. In October?

A. Yes.

Q. None of them would be running loose anywhere in there?

A. Very little if anywhere.

Q. And if you didn't have a dob of paint on them they would get mixed up with other cattle with the same brand and you couldn't identify them?

Judge Baum: Objected to as argumentative.

(By the Court): He may answer.

A. I don't see how they could tell them.

(Testimony of Orland Robertson.)

Q. No, except for this daub of paint?

A. That's right.

Q. How many different brands would you say was on this 218 head of cattle?

A. I wouldn't say. I don't know.

Q. What is your estimate?

A. I wouldn't give an estimate.

Q. Was there more than one?

A. Other than the O V A you mean?

Q. Yes. A. Yes, there was.

Q. Would there be ten?

A. I wouldn't say. [62]

Q. Would there be five?

A. I know of three more besides the O V A that was local brands. Other than the cattle that came from Pinedale, but whether he bought them locally I don't know.

Q. You say you fed these for twenty-eight or thirty days? A. Yes, sir.

Q. And you don't know any more about the brands than you have just stated?

A. I don't know the number of them. I don't know any of the Pinedale brands. At that time I could remember what the local brands were, but I haven't worked around the local stock lately and I have forgot.

Q. Mr. Ruud volunteered this information that he had these cattle under contract?

A. He said he had them for delivery under contract and he wanted to put on as much gain as possible; he was telling me how to feed them.

(Testimony of Orland Robertson.)

Q. He wanted to put as much gain on as he could because he had them under contract?

A. I guess so.

Q. Did he say who he had them contracted to?

A. No, sir.

Q. What did you feed them? A. Hay.

Q. Any grain? [63] A. No, sir.

Q. Just plain hay? A. Yes.

Q. What kind of hay was that?

A. Mostly timothy and clover, a little wild hay in it.

Q. Did the cattle do pretty well on it?

A. Yes, sir.

Q. Are you getting paid for coming down here to testify? A. No, sir.

Q. Nothing whatever? A. No, sir.

Q. Are you getting your expenses paid?

A. I don't know, sir.

Q. Did you and Mr. Ruud ever have any trouble? A. Just arguments.

Q. You testified in this case the last time, did you not? A. Yes, I was on the stand.

Q. Now, this argument that you had, what do you mean by that; how serious was that?

A. It wasn't so serious.

Q. Did he fire you or discharge you from his employ?

A. No, sir; he sent a man to take my place and I went back where I was.

Q. Did he fire you? [64]

A. He told me this fellow I was working for

(Testimony of Orland Robertson.)

needed me back and he sent this man up to replace me.

Q. Mr. Ruud told you that your former employer needed you?

A. Well, he never told me personally, he wrote a letter to me and sent it with the man.

Q. And did that arouse resentment in you against Mr. Ruud?

A. I didn't care for his way of doing business.

Q. Isn't it a fact that Mr. Ruud didn't at any time mention any contract on these cattle, to you?

A. Isn't it a fact, you say?

Q. Isn't it a fact that he didn't, at any time, mention any contract in connection with the cattle, to you?

A. He did mention it, he didn't mention who it was to but he did mention it, he didn't say who it was or anything like that, but he said he had that contract and he wanted to put on as much gain as possible.

Q. Your feelings against Mr. Ruud would not influence your testimony here any, would it, Mr. Robertson?

A. No, sir.

Q. You are living in Jackson Hole now?

A. That's right.

Q. Isn't it a fact that there was a very decided variation in the weights of those cattle you fed there at Moran for Mr. Ruud?

A. I didn't get that. [65]

Q. I say, wasn't there a decided variation in the weights of those cattle you fed for Mr. Ruud? Was there some of them light, some heavy, and some of them two-year-olds?

A. Not so much.

(Testimony of Orland Robertson.)

Q. There was a variation in the weight?

A. Yes, but not so much. Not so much difference, I didn't state that to be the correct weight, it is approximate.

Q. Isn't it a mixed bunch of steers?

A. That's right, it was a mixed bunch.

Q. They were not all yearlings?

A. The biggest majority was long yearlings.

Q. Some people call them two's.

A. Over in our country we call them long yearlings.

Q. Some of them would weigh as much as two to three hundred pounds more than others?

A. I wouldn't know, I never saw them weighed.

Q. You saw the cattle? A. Yes, sir.

Q. You have had experience and know how much cattle will grow and how much steers weigh, when you look at them? A. Approximately.

Q. Isn't it a fact that those cattle varied as much as two to three hundred pounds from the large to the small?

A. They would not vary that much, I don't think.

Q. Well, how much would the variance be? [66]

A. Maybe a hundred to a hundred and fifty pounds.

Q. From the largest to the smallest?

A. Somewhere in there.

Q. You saw them every day for thirty days or more?

A. Twenty-eight to thirty days, I doubt if it was that long.

(Testimony of Orland Robertson.)

Q. When they were sold it would be your judgment that they would vary about the same in weight, or would that variation be more or less in August, 1947?

A. I never saw the steers again. I couldn't tell.

Q. If the greatest variation was a hundred and fifty pounds in weight, how would you say that variation would be in August 1947?

A. Approximately the same.

Q. If some of them weighed 1250 pounds in August, 1947, and some of them weighed 850 pounds would you say it could be the same bunch of cattle?

A. I don't imagine it would be but I don't know.

Q. Were those all White Faces?

A. Most of them white-faced, some of them brockle-faced.

Q. Now, that conversation in the Wort Hotel that night, will you relate that again to us?

A. In the Wort Hotel?

Q. Yes, with Mr. Ruud.

A. That was the night I went to see him and make a deal to go to work. My foreman said he would leave it to the two of us to decide. I told this other boy I would go. [67] There was two of us and the foreman says he would leave it to the two of us to decide, and I told him I would go up and go to work for him, and I went in to the hotel and saw him and we made the deal on that night.

Q. What did you say and what did he say to you?

(Testimony of Orland Robertson.)

A. We talked about going to work and about steers,—I don't remember the words.

Q. You don't remember what he said and what you said?

A. I told him I was coming to Idaho for a week or ten days and when I came back I would go to work.

Q. About the only definite part of that conversation you remember is that he told you he had these cattle under contract?

Judge Baum: We object to that as not proper cross-examination. The conversation as to the cattle being under contract was not in the hotel.

A. No, that was the day I went to work.

Q. The conversation in the Wort Hotel, can you give that?

A. That is the one I told you; that is the one where I talked about going to work for him.

Q. Where did this other conversation take place?

A. At the Elk Ranch.

Q. What day was that, approximately?

A. That was approximately the 8th or 10th of November.

Q. The 8th or 10th of November? [68]

A. Yes; that was after I came back from Idaho.

Q. Had you been working for Ruud at that time? A. No, not at that time.

Q. When did you start to work for him?

A. The 8th or 10th of November.

Q. What time of the day was this? —

A. In the afternoon.

(Testimony of Orland Robertson.)

Q. At the ranch? A. Yes, the Elk Ranch.

Q. And where at the ranch?

A. Ten miles east of Moran.

Q. Will you relate that conversation?

A. He told me the number of cattle and how they were marked.

Q. Well, what did he say?

A. He said there was 218 head and they were marked with green paint on the left hip and that he wanted all the gain he could put on them because he had them under contract to be delivered next Fall.

Q. And what did you say?

A. There wasn't much I could say.

Q. What did you say?

A. I don't remember what I did say.

Q. You don't remember what you said?

A. We talked about the cattle, back and forth.

Q. Was this good quality hay that you were feeding? [69]

A. The hay Mr. Ruud had was pretty fair hay.

Q. Isn't it a fact that those cattle came out the next Spring weighing less than they did in the Fall, if you know?

Judge Baum: Objected to, this witness has said that he didn't see them since November.

The Court: He may answer. Counsel asked if he knows.

Q. Do you know? A. No, sir, I don't.

Mr. Albaugh: That is all.

Judge Baum: That is all.

O. T. BLAINE,
called as a witness for the plaintiff, after being first
duly sworn, testifies as follows:

Direct Examination

By Judge Baum:

Q. You reside at Idaho Falls?

A. Yes, sir.

Q. And your business or employment?

A. Office manager for the Idaho Livestock Auction Company.

Q. Were you so employed in the Fall of 1947?

A. Yes, I was.

Q. That included the months of August, September and October of that year?

A. Yes, sir. [70]

Q. Who has control of the books of that corporation? A. I do.

Q. Did you have control of them in August, 1947? A. Yes, sir.

Q. And September and October, 1947?

A. Yes, sir.

Q. Look at exhibit number 5 and state what it is?

A. Account Sales for 149 cattle sold by Mr. Ruud at Idaho Falls, September 10, 1947.

Q. What does it show?

A. The number of cattle, description of the cattle, the price per hundred weight, the weight; the purchaser; the amount of money and the amount of the checks issued.

(Testimony of O. T. Blaine.)

Q. Is there attached to each exhibit, a check?

A. There is.

Q. Now, exhibit number 6, what is that?

A. That is the same thing on September 17.

Q. How many head does exhibit 5 show?

A. 149 head.

The Court: And the other one?

A. 26 head.

Q. On exhibit 6, that shows twenty-six head.

A. Yes, twenty-six steers.

Q. Are those records of your office? The ones you have there?

A. Yes, sir. [71]

Q. And checks issued by your office?

A. Yes, sir.

Judge Baum: That is all of this witness at this time?

Mr. Albaugh: You are recalling him?

Judge Baum: If not, you may call him for cross-examination, we will have no objection.

Mr. Albaugh: That is agreeable with us, if it is satisfactory to the Court.

The Court: Yes, you may do that.

RAY SKELTON,

called as a witness for the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Judge Baum:

Q. State your name. A. Ray Skelton.

Q. Where do you reside, Mr. Skelton?

A. Idaho Falls, Idaho.

Q. What business are you engaged in?

(Testimony of Ray Skelton.)

A. Livestock Commission business.

Q. With what concern?

A. Livestock Auction Company.

Q. Were you so engaged in October, September and August of 1947? A. Yes, sir. [72]

Q. Will you look at exhibit 5 and state, if you know, what that is? A. Yes, sir.

Q. What is it? A. Account of sale.

Q. What company or institution?

A. Idaho Livestock Auction Company.

Q. That exhibit is an account of sale of the Idaho Livestock Auction Company of Idaho Falls?

A. Yes, sir.

Q. Thereon is a memorandum listed on there as to the purchaser of the cattle, is it "J D"?

A. That is ILSA R 6, that is an order of mine that I bought on that day.

Q. That is an order of yours? A. Yes, sir.

Q. Is there any other information on that exhibit that indicates that the cattle were bought on a direct order of yours?

A. ILSA R 6, yes.

Q. That is the top one? A. Yes.

Q. How many head of cattle on that order?

A. One on that order. [73]

Q. Now, the next order you issued?

A. Another one, that is below that eight head, it is the seventh line.

Q. What does it indicate?

A. It is indicated the same way ILSA R 6.

Q. How many head of cattle on that order?

A. One.

(Testimony of Ray Skelton.)

Q. Go on down through the exhibit.

A. Two steers on down.

Q. How is that indicated?

A. The same way ILSA R 6.

Q. How many more are there?

A. One at a time for two lines below that.

Q. What is the next one?

A. Fifty head at the bottom.

Q. Fifty head?

A. Fifty steers that is indicated R 50 ILSA,
at \$26.15 and one at \$23.15.

Q. One at \$26.50? A. That's right.

Q. And one at \$23.50, you said?

A. \$23.15.

Mr. Albaugh: It seems to me the document is
the best evidence of what it contains.

Judge Baum: Very well. [74]

Q. You are referring to what exhibit, Mr. Skel-
ton? A. Exhibit 5.

The Court: Are these the same exhibits the for-
mer witness identified?

Judge Baum: Yes, Your Honor, they are.

Q. What exhibit did you have there?

A. Exhibit 5.

Q. Did you in giving these orders see the cattle
yourself? A. Yes, sir.

Q. You saw the type of cattle they were?

A. Yes, sir, and I would call them real good
cattle.

Q. Good quality? A. Yes, sir.

Q. Steers? A. Yes, sir.

(Testimony of Ray Skelton.)

Q. Now the next exhibit, does that refer to any matter you have presented here?

A. Eighteen steers was an order of mine, it is designated ILSA ED.

Q. You saw those steers, did you?

A. Yes, they were very good, too.

Q. Is there any other notation you recognize, any other cattle that you gave orders to buy?

A. No, sir.

Judge Baum: At this time we offer in evidence [75] exhibits 5 and 6.

Mr. Albaugh: We object to the introduction of exhibits 5 and 6. They have failed to connect them with this contract, or the cattle described as the subject matter in issue. It is an attempt to vary or modify the terms of the written contract by parol testimony without any pleadings upon which to base such testimony or such a modification of the contract. These could be any cattle. It is incompetent, irrelevant and immaterial and cannot prove or tend to prove any issue in this case.

The Court: There may be a difference of opinion about that. The objection is overruled.

(Testimony of Ray Shelton.)

PLAINTIFF'S EXHIBIT No. 5

Idaho Livestock Auction Co.

(A Market Agency)

149

Idaho Falls, Idaho 9/10/47

Sold for Account and Risk of: Bert Rudd, P. O. Alpine.

Cattle	Price	Weight	Purchaser	Amount	Total
1 str.	24.50	950	Ilsa R 6	232.75	
25 str.	26.10	26590	Poulsen 25	6,939.99	
25 str.	26.35	29515	Ilsa 12	7,777.20	
27 str.	25.75	25025	Ilsa 27	6,443.93	
8 str.	25.50	7720	Poulsen	1,968.60	
1 str.	23.40	1210	Isla R 6	283.14	
1 str.	24.35	1040	Poulsen	253.24	
1 str.	23.80	1140	Ilsa 9	271.32	
1 str.	24.00	845	Poulsen	202.80	Hold Brand
1 str.	25.00	990	Isla 9	247.50	
1 str.	23.70	935	Arthur	221.59	
1 str.	23.90	955	Poulsen	228.24	
1 str.	24.00	925	Poulsen	222.00	
2 str.	23.70	1950	Ilsa R 6	462.15	
1 str.	24.40	1010	Ilsa R 6	246.44	
1 str.	23.10	1165	Ilsa R 6	269.11	
1 str.	22.90	1165	Poulsen	266.78	
50 str.	26.15)				
1 hd off	23.15)	51365	R 50 Ilsa	13,401.13	\$39,937.91

149

154495

Truck or Freight, including charges on road....	145.00	
Feed	67.05	
Commission	260.75	
Brand Inspection	14.90	487.70

Net Proceeds.....	\$39,450.21
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Wyoming Stock Growers 1 ck hold.....	\$ 199.50
1 ck. O.K.	\$39,250.71

Check to Hold

(Testimony of Ray Shelton.)

[Idaho Livestock Auction Co. Billhead]

a/c Bert Ruud

[In red]: Do Not Count

Idaho Falls, Idaho, 9/11/47

Sold for Account and Risk of: Wyoming Stock Growers Assoc.

P.O. Cheyenne, Wyo.

Cattle	Price	Weight	Purchaser	Amount	Total
1 str.	24.00	845	Poulsen	202.80	
					<hr/> \$202.80
Truck or Freight, including charges on road.....				\$ 1.45	
Commission				1.75	
Brand Inspection10	3.30
					<hr/>
Net Proceeds.....					\$199.50

PLAINTIFF'S EXHIBIT No. 6

[Idaho Livestock Auction Co. Statement]

26 ctl

Idaho Falls, Idaho, 9/17/47

Sold for Account and Risk of: Bert Rudd, P.O. Irvin.

Cattle	Price	Weight	Purchaser	Amount	Total
18 str.	25.20	18880	Ilsa Ed	4,757.76	
1 str.	23.00	945	Morris	217.35	Hold for Wyo
7 str.	26.00	9000	Ilsa 11	2,340.00	
					<hr/> \$7,315.11

26

Truck of Freight, including charges on road....				\$ 27.00	
Feed				23.40	
Commission				45.50	
Brand Inspection				2.60	98.50
					<hr/>
Net Proceeds.....					\$7,216.61

Pay to the order of J. T. Rudd.—Bert Rudd.

J. T. Rudd—Hold 1 ck.	\$ 213.35
O.K.	7,003.26

Judge Baum: You may take the witness.

(Testimony of Ray Shelton.)

Cross-Examination

By Mr. Barnard:

Q. Did you notice any brand on those cattle?

A. No, sir.

Q. You don't know what brand might have been on them? A. No, sir.

Q. There is nothing on exhibits five and six to indicate the brand that was on those cattle?

A. No, sir.

Mr. Barnard: That's all.

Judge Baum: Nothing further. [76]

J. J. SMITH,

recalled as a witness by the plaintiff, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Judge Baum:

Q. Will you look at these exhibits which the Bailiff handed you and then I will ask you a question concerning them? A. Yes, sir.

Q. Now, Mr. Smith, have you looked those over?

A. Yes, sir.

Q. Did you, in your capacity at Brand Inspector, make any record of the brand those cattle bore at the time of the sale? A. Yes, sir.

Q. Have you those records?

A. Yes, sir.

Q. Can you take the first exhibit, which is exhibit 3 and state to the Court the Brands those cattle bore?

A. Yes, sir, they had O V A monogram, connected together on the left ribs.

(Testimony of J. J. Smith.)

Q. The entire nine of them? A. Yes, sir.

Q. Now, take exhibit 5,—withdraw that, please,—do you know whose brand the O V A is. Who owns that brand?

A. Bruce Porter, Jackson, Wyoming. [77]

Q. Now, take exhibit 5. State to the Court all the cattle that had any brand and give the brand?

A. Could I give the brands,—I have these two exhibits with the brands listed together.

Q. Well, take the two exhibits then.

A. They was,—do you want the number of each brand?

Q. Take the exhibits and the number of cattle sold on October,—no, on September 10, give, if you know, the brands, and the number of each brand.

Q. Nineteen cattle, with upside down U on the left shoulder and upside down U on left ribs and left hip.

Q. Whose brand is that?

A. Mrs. Ora Grismer.

Q. Go ahead.

A. Fifteen and twenty-nine were branded X A with Bar Cross on the lower part of it.

Q. What brand is that?

A. That is the Ball brand.

Q. Who was the owner?

A. Ball,—Delbert Ball.

Q. Where does Delbert Ball reside?

A. Pinedale.

Q. Go ahead.

A. Ten and twenty-one with O V A on them.

(Testimony of J. J. Smith.)

Q. And whose brand is that? [78]

A. Bruce Porter.

Q. You said he was from Jackson, Wyoming?

A. Yes, sir.

Q. Now, go ahead.

A. I have got sixteen steers with Diamond over mill iron on the right hip.

Q. Whose brand is that?

A. That is Robinson's brand.

Q. Is that George Robinson? A. Yes.

Q. Where does he live?

A. In Jackson Hole, down the Hoback.

Q. Go ahead.

A. Sixteen steers with Upside down U Bar N on the left hip.

Q. Do you know whose brand that is?

A. That is Robinson's,—George Robinson's brand and the other one, the Diamond and Mill Iron brand, is the Ricks brand. I don't have them listed and I was mixed up on that.

Q. Go ahead.

A. There was twenty-one of those Ricks cattle instead of 16, if I said 16 before.

Q. And how many does that give you of the Robinson cattle? A. Sixteen.

Q. Any of Frank Jensen's cattle? [79]

A. Yes, sir.

Q. How many? A. Four head.

Q. To shorten this up, Mr. Smith, do you have on exhibit five, any of Frank Jensen's brand M6 on the left hip? A. Yes, I have.

(Testimony of J. J. Smith.)

Q. Refer to your list and these exhibits you have and tell us how many of those cattle on the exhibits are branded M6 on the left hip?

A. Four of the M6 branded cattle on the exhibits.

Q. Who does that brand belong to?

A. Frank Jensen.

Q. Where does he live?

A. Out around Daniels, close to Daniels.

Q. Where was Wayne Ricks residing?

A. At Jackson,—he gets his mail at Jackson.

Q. Have you any record of the other cattle?

A. Yes, sir.

Q. What is the brand and by whom is it owned?

A. On these exhibits, you mean?

Q. Yes.

A. I would like to get another record I have here.

The Court: This is all very confusing to the Court.

Q. Now, have you the remaining part of your records you mentioned? [80] A. Yes.

Q. Take these exhibits and, if you can, give us the number of steers on each exhibit and what brand they bore. The ones shown as sold for Bert Ruud. I think you gave us the nine sold in August. A. Yes, sir.

Q. They bore the O.V.A. brand?

A. Yes, sir.

Q. Now, go to the sale of September 10 and September 17.

(Testimony of J. J. Smith.)

A. Twenty-six steers with U on left shoulder and upside down U on left ribs and straight U on left hip. Twenty-six of those.

Q. Whose brand is this?

A. Ora Grismer.

Q. Ora Grismer resides where?

A. Jackson. Forty-four cattle with Cross A brand, they were steers.

Q. Where was that brand placed on the steer?

A. Left ribs.

Q. Whose brand is that?

A. Delbert Ball.

Q. He resides where? A. Pinedale.

The Court: This witness is having some difficulty in checking these. We will recess for fifteen [81] minutes.

3:15 P.M., May 25, 1948

Q. Now, Mr. Smith, refer to exhibit 3 and tell us if you can what the brands were on those cattle. Can you give us the brands on those cattle listed in exhibit 3? A. Yes, sir.

Q. What brand did they bear?

A. O V A on left ribs.

Q. That was the brand of Bruce Porter, of Jackson, Wyoming? A. Yes, sir.

Q. Now, on exhibit five, give us the brands on the cattle listed there, the number of the cattle and the owner of the brand.

A. Exhibit 5?

Q. Yes, exhibit five.

A. There is eight steers with O V A brand on left ribs.

(Testimony of J. J. Smith.)

Q. That was the Bruce Porter brand?

A. Yes, sir.

Q. Go ahead.

A. Five steers with the Upside down U on left shoulder and on the ribs and the straight U on the left hip.

Q. Whose brand is that?

A. Ora Grismer.

Q. And the next.

A. One steer with,—well, it is more like a Cock-eye that is [82] recorded to Billy Byers.

Q. Where does he reside? A. Pinedale.

Q. The next.

A. Six head with the Cross A on the left ribs.

Q. Whose brand is that?

A. That is Delbert Ball's brand.

Q. He resides at Pinedale also, you said?

A. Yes, sir.

Q. Go ahead.

A. Two steers with Upside down U and Bar N on the left hip.

Q. Whose brand is that?

A. That is Wayne Ricks brand.

Q. He resides in Jackson, Wyoming?

A. Yes, sir.

Q. Go ahead.

A. Three steers with Diamond over Mill iron on the left ribs.

Q. Whose brand is that?

A. George Robinson,—I was a little mixed on these brands before, when I testified to them.

(Testimony of J. J. Smith.)

Q. Where does he live?

A. Jackson Hole, on the Hoback.

Q. Go ahead with the next.

A. One steer with M6 brand.

Q. Whose is that? [83]

A. Frank Jensen's.

Q. Where does he live? A. Daniels.

Q. Is that all the cattle shown on exhibit 5?

A. Yes, it is.

Q. Now, take the next exhibit. Exhibit 6.

A. Exhibit 6, there are twenty-five steers with upside U on left shoulder and ribs and straight U on left hip.

Q. Whose brand is that?

A. Mrs. Grismer's.

Q. Mr. Smith, I think we referred to the exhibit with the twenty-six head of cattle listed on it, as exhibit 5 and you gave the brands and the owners of the brands; that should have been indicated as exhibit 6 and we are now starting on exhibit 5. A. Yes.

Q. Now, go ahead.

A. The twenty-five steers with upside down U on left shoulder and ribs and straight U on left hip, that was Mrs. Grismer's brand.

Q. The next one.

A. Forty-four with Cross A.

Q. Is that the same Cross A brand you referred to before? A. Yes, sir.

Q. And owned by the same person? [84]

A. Yes, sir.

(Testimony of J. J. Smith.)

Q. All right.

A. Thirty-four with the Bruce Porter brand; twenty-four with the Diamond Over Mill Iron brand,—that is the George Robinson brand.

Q. Those are the same men you referred to before? A. Yes, sir.

Q. Go ahead.

A. One with M over the hanging 6.

A. Is that the brand you referred to as belonging to Mr. Frank Jensen? A. Yes, sir.

Q. Wait a minute, we are crossed up here. Could I repeat this exhibit?

Q. Yes.

A. All right. Twenty-five with the Grismer brand; forty-four with the Cross A brand; thirty-one with the O V A brand; twenty-one with the diamond over mill iron brand, that as I told you, is the George Robinson brand, and sixteen with the upside U Bar N brand.

Q. And that is whose brand?

A. That is the brand of Wayne Ricks. Three steers with quarter circle L Bar.

Q. Whose is that?

A. E. C. Todd's. [85]

Q. Where does he live? A. Pinedale.

Q. Go ahead with the next?

A. Four steers with the M hanging 6 brand, that is the Frank Jensen brand, and there was one with W F brand, the F upside down and connected.

Q. Did you have four with E G brand?

(Testimony of J. J. Smith.)

A. Yes, sir.

Q. Whose brand is that?

A. That is Mr. Calton's.

Q. And where does Calton live?

A. In the Daniel country.

Q. You have given all the brands on the cattle in those three exhibits, now?

A. Yes, sir.

Q. Have you in your possession the brands on some cattle that Mr. Bert Ruud shipped to Denver, Colorado?

A. Yes, sir.

Q. How many head were there?

A. Thirty-one head.

Q. Can you give us those?

A. Yes, sir. Thirty-one steers branded O V A left ribs.

Q. Whose was that?

A. That is the Bruce Porter brand. They were loaded at Cokeville and arrived at Denver on August 22, 1947. [86]

Q. Does your record show the bringing of certain cattle by Mr. Ruud from Jackson to Idaho in the Spring of 1947?

The Court: Those to Denver, are they in addition to the steers you have been talking about?

Judge Baum: Those are not the ones the witness has testified about.

Q. Have you a record of the number of cattle Mr. Ruud brought from Jackson Hole to Idaho in the Spring of 1947?

A. Yes, sir.

Q. Now, the number of those?

A. 218 head.

(Testimony of J. J. Smith.)

Q. 218 head brought to Idaho.

A. Yes, he told me that he brought them from the Elk Ranch in Jackson Hole, Wyoming, to Irwin, Idaho.

Q. Can you give us the brands, the number of different brands? A. Yes, sir.

Q. Do so.

A. Twenty-eight branded Upside down U on the left shoulder and left ribs and U on the left hip, that was Mrs. Ora Grismer's brand. Seventy-eight steers with the O V A brand; this was the Bruce Porter brand. Fifty-three steers with the Cross A brand on, that was the Delbert Ball brand.

Q. That brand was where on the cattle?

A. The left ribs. [87]

Q. Go ahead, or had you finished?

A. No. There was twenty steers that were branded with the Upside down U Bar N on the left hip; that was Wayne Ricks' brand. He had nine branded M hanging 6—no, that is wrong—nine steers with quarter circle L Bar; that is the E. C. Todd brand. Five steers with M hanging 6 brand on the left hip that is Frank Jensen's brand and twenty-five Diamond over Mill Iron, that is George Robinson's brand. And I think that is 218 head.

Q. Have you the date they were brought from Jackson into Idaho?

A. Yes, I have. They were inspected out of Teton County on May 9, 1947.

Judge Baum: Take the witness.

(Testimony of J. J. Smith.)

Cross-Examination

By Mr. Albaugh:

Q. Mr. Smith, when you were on the stand a while ago you mentioned a conversation you had with Bert Ruud concerning Bruce Porter and the nine head of cattle? A. Yes, sir.

Q. Where did that conversation take place?

A. I think it was in my office or around there close.

Q. About what time of the year was that, as close as you can fix it?

A. It was some time after these cattle were shipped to the [88] market.

Q. You are acquainted with Mr. Salerno of the plaintiff corporation? A. Yes, sir.

Q. He had been up to see you some time before you had this conversation with Mr. Ruud?

A. I don't recall that; I saw Mr. Salerno there every sale pretty near. I don't recall any conversation until pretty late in the year with Mr. Salerno.

Q. Before you had this conversation did Mr. Salerno claim that he had some cattle under contract with Mr. Ruud?

A. Yes, he told me he had some but I wouldn't say the specific time he said.

Q. Wasn't that the occasion for this conversation about the contract on the Bruce Porter Cattle. You made some inquiry whether these cattle were under contract?

(Testimony of J. J. Smith.)

A. No, I don't think I did. I don't ask shippers their business, no more than getting the title of the cattle I am interested in.

Q. What was the occasion for the conversation about the cattle being under contract if you didn't inquire?

A. Mr. Ruud gave me the information when I was trying to clear this deal up.

Q. Did he tell you Mr. Salerno claimed he had some cattle under contract? [89]

A. Yes, sir, he said he had them and that there might be some complications either way. I understand that was because he had the cattle under contract to the American Packing Company.

Q. Did he tell you there was a controversy over the matter at that time?

A. I don't know that he went into detail at that time.

Q. Did he use the word complications?

A. I wouldn't be sure about that, but he said these cattle had nothing to do—I understood that the cattle, the nine cattle had nothing to do with the cattle he had under contract; how that came about I don't remember, I have thought of many things since that time.

Q. You knew there was a controversy around the stockyards; it was generally discussed that there was some dispute between Mr. Ruud and the American Packing and Provision Company?

A. Yes, sir.

Q. You heard that from several places?

(Testimony of J. J. Smith.)

A. Mr. Porter told me he had sold these cattle to Mr. Ruud and Mr. Ruud in turn sold them to the American Packing Company.

Mr. Albaugh: I move that answer be stricken as not responsive.

The Court: What Mr. Porter said may go out.

Q. When you had this conversation with Mr. Ruud about the nine head, you knew about this controversy or complication between the American Packing and Provision Company and Mr. Ruud?

A. No, I didn't, because I thought if there was any that Mr. Ruud would turn the cattle over. I don't know that I knew there was any trouble between the American Packing Company and Mr. Ruud.

Q. You knew there was a complication?

A. I imagined there was from what Mr. Porter said when he wouldn't claim the cattle.

Mr. Albaugh: I move that answer be stricken as not responsive.

The Court: The answer may stand.

Q. You knew that Mr. Salerno, as the buyer was claiming these nine head of cattle, didn't you?

Judge Baum: At that time.

Q. When this conversation took place?

A. I don't know that I did. I would like to explain something more.

Q. Just answer the question, Mr. Smith.

A. Yes, I think I did.

Q. How did you know that?

A. I think that Mr. Salerno purchased the cattle that day, the nine head of cattle. [91]

(Testimony of J. J. Smith.)

Q. That Mr. Salerno was claiming the cattle, the nine head?

A. You hear things that you don't jot down.

Q. You knew it, but you don't remember how you learned it, is that right, Mr. Smith?

A. That is about it.

Q. Mr. Ruud told you that the Bruce Porter cattle were not under contract? A. That is right.

Q. And that is about the substance of the conversation, isn't it?

A. Any more than just pertaining to the bill of sale, yes, and to the title of the cattle.

Q. Those cattle concerning which you have been testifying as to the brands, and referring to exhibits five and six, were they the same cattle you saw on Mr. Ruud's ranch at Irwin, Idaho?

A. Yes, I presume they were.

Q. You examined the cattle enough to identify them with these sales accounts? A. Yes, sir.

Q. That is, the cattle on his ranch?

A. Yes, sir.

Q. Tell us about when you saw them on the ranch?

A. It was in May,—some time in May or shortly after because [92] the Sheriff at Jackson called me to go and see where they were, and to look at the cattle.

Q. You went to look at them?

A. To see if they went out of the State of Wyoming into Idaho.

(Testimony of J. J. Smith.)

Q. They checked up all right with the cattle that had come out of Jackson Hole into Swan Valley to the best of my ability to check them.

Q. Did you see them after May, 1947?

A. I saw them a time or two as I drove past on the road.

Q. When did you see them last before they were taken to Idaho Falls?

A. Well, I don't know. I looked them over,—no, I don't know after I went to look at them for the Sheriff I didn't pay no attention.

Q. You saw them twice, you say, between May and the first of September?

A. I saw cattle there and they looked like the same cattle.

Mr. Albaugh: That's all.

Judge Baum: That is all, thank you.

GARTH B. PECK,

called as a witness by the plaintiff, after being first duly sworn, testified as follows:

Direct Examination

By Mr. Olmstead:

Q. Do I understand that it is [93] stipulated that exhibit 7 is a letter written by Mr. Fallentine of the American Packing and Provision Company to Mr. Ruud and received by Mr. Ruud?

Mr. Albaugh: We have no objection to that stipulation.

Mr. Olmstead: Then I will offer that exhibit in evidence.

The Court: If there is no objection it is admitted.

(Testimony of Garth B. Peck.)

PLAINTIFF'S EXHIBIT No. 7

[American Packing & Provision Co.]

August 26, 1947.

Registered Return Receipt Requested

Mr. Bert Ruud

Irwin

Idaho

Dear Sir:

Your letter of August 22, 1947, addressed to this Company concerning delivery of cattle contracted for between this Company and you under date of November 4, 1946, has been received. Our interpretation of the letter is that you are now seeking to avoid your contract which called for delivery to this Company of 300 steers as called for by this Company between August 1, 1947, and October 1, 1947. If you will refer to your copy of the Contract, you will observe that there was an unconditional agreement upon your part to deliver to this Company 300 head of steers, as described in the contract, and we are aware of no valid reason why you should not fulfill as you agreed. It is true, of course, that the price has gone up since the date of the contract, but we are not unmindful of the fact that if the reverse had been true and the price had gone down, this Company would have been obligated to pay the contract price, and we have no doubt but that you would have insisted upon a strict compliance by us.

(Testimony of Garth B. Peck.)

Paragraph 4 of the contract calls for delivery by you of the steers to this Company, f. o. b., Ogden, Utah, as called for by this Company between August 1, 1947, and October 1, 1947, and demand is accordingly herewith made upon you for delivery of such steers immediately. In the event the same are not received by next Wednesday, September 3, 1947, the matter will be referred to our attorneys for appropriate action against you for breach of your agreement to deliver as set out in the contract.

Very truly yours,

AMERICAN PACKING &
PROVISION CO.,

By /s/ E. W. FALLENTINE,

Vice-President.

Q. Now, will you state your name?

A. Garth Peck.

Q. Where do you reside? A. Ogden.

Q. Ogden, Utah? A. Yes.

Q. What is your business?

A. Peck Brothers Livestock Commission.

Q. Where is that located?

A. At the Union stockyards.

Q. At Ogden? A. Yes, sir.

Q. How long have you been associated with that concern?

A. I have been there since I was five years old, but I have been associated since 1941.

Q. You have been associated and interested in the Company for seven years? [94]

A. Yes, sir, except while I was in the service.

(Testimony of Garth B. Peck.)

Q. What is that business?

A. We sell them to the highest bidder.

Q. It is a livestock business, you buy and sell?

A. We have them consigned,—people consign their cattle to us and we sell them to the highest bidder.

Q. How many cattle do you handle?

A. I think for 1947 it was between forty-seven and fifty thousand head.

Q. That was for 1947? A. Yes, sir.

Q. From your experience in the operation of that business can you state whether or not in August and September, 1947, there was a market for good quality steers at Ogden, Utah?

Mr. Albaugh: That is objected to, there is nothing in the contract that requires the steers to be of good quality. It is incompetent, irrelevant and immaterial.

The Court: That question can be answered yes or no.

Q. State whether there was a market or not?

A. Yes, there was a market there.

Q. Now, from your experience in the operation of that business [95] and with the market during August and September, 1947, can you state what the market value of good quality live steers was at Ogden, Utah?

Mr. Albaugh: We make the same objection that it is not the proper way to prove this, it is incompetent, irrelevant and immaterial. There is nothing in the contract that requires the steers to be of good quality, or of any other quality.

(Testimony of Garth B. Peck.)

The Court: The objection is overruled with the observation that this is a matter subject to further examination.

A. That would depend on whether you mean slaughter steers or feeders.

Q. Give us both.

Mr. Albaugh: Objected to as incompetent, irrelevant and immaterial.

The Court: The same ruling.

A. Well, on slaughter steers they would have brought, let's see, those figures would be twenty-two to twenty-three cents, and slaughter steers from 25 to 26.

Q. Was that generally true through August and September?

A. August was perhaps slightly lower than September and toward the end of September they kept going higher.

Mr. Olmstead: That is all, you may examine.

Cross-Examination

By Mr. Albaugh: [96]

Q. What would common steers be worth?

A. That again brings the question of killer and feeder.

Q. Published in the reports as common steers?

A. 16, 17½, or 18, along in there.

Q. And there are many different grades of steers.

A. Yes, sir.

Q. There are what they call canners?

A. There are very few that are sold for canners unless there was something wrong, something physically wrong.

(Testimony of Garth B. Peck.)

Q. These slaughter steers at 25 to 26 cents would they have been off grass or would they have been grain fed.

A. The majority would have been off grass. At that time there would be very few grain fed steers coming in.

Q. And that price would vary with the grade of slaughter steers?

A. That was for good grade slaughter steers.

Q. That would be about the top grass fed slaughter steers? A. Yes, sir.

Q. Then they would run down in the various grades, down to the price you gave for common steers? A. That is correct.

Mr. Albaugh: That is all.

Redirect Examination

By Mr. Olmstead:

Q. Mr. Peck, would you say that steers purchased in the [97] fall of 1946 and fed until in the late Summer of 1947 with the price to be paid for them following the slaughter of the steers,—would you say they could normally be other than slaughter steers?

Mr. Albaugh: That is objected to as incompetent, irrelevant and immaterial, and the witness is not shown to be qualified.

The Court: The question is argumentative, the objection will be sustained.

Q. Mr. Peck, when you refer to common steers were you referring to slaughter or feeders?

(Testimony of Garth B. Peck.)

A. When you get down to common grade, they are usually mixed breed, common Jersey and common Holstein, they could be slaughter steers.

Q. When you refer to the 16 and 17 cent price were you referring to feeder or slaughter steers?

A. Slaughter steers.

Q. And what grade?

A. That would be, I imagine U S grade,—

Q. Let me ask this, what quality?

A. Common steers.

Q. Does that include White Faces?

A. No, very few of them would go to the packers unless they were sick or cripples or had lump-jaw or something like that. [98]

Q. When you spoke of common steers at 16 and 17 cents as the market price, were you speaking of White Faces, white-faced steers?

A. No.

Mr. Olmstead: That is all.

The Court: What is the trade meaning of common; is that restricted?

A. It is a steer that cannot grade above utility, it could be a cross-breed that shows some White Face,—a Hereford Bally steer, and they could be other breed,—I mean they would have other breeding beside White Face.

The Court: That is all I have to ask the witness.

Mr. Olmstead: No other questions.

Mr. Albaugh: That is all.

RAY SKELTON,

recalled as a witness for the plaintiff, having heretofore been duly sworn, testified as follows:

Direct Examination

By Judge Baum:

Q. You were on the witness stand before.

A. Yes, sir.

Q. How long have you been handling livestock?

A. All my life.

Q. And your age now? [99]

A. Forty-three.

Q. How long have you been engaged in the livestock business at Idaho Falls?

A. Since 1938.

Q. Refer to these exhibits, Mr. Skelton, and look at the price range per pound and say whether they refer to good quality steers?

Mr. Albaugh: Objected to as incompetent, irrelevant and immaterial. There is nothing so far to connect the cattle shown in the account sales with the cattle covered by the contract?

The Court: Overruled.

A. I would say that it does.

Q. What do you mean by "it does." What does it indicate to you?

A. The thinner cattle would be the cheaper cattle.

Q. These cattle that show a price of 24½ cents and 25 cents a pound, what would you say as to them?

A. Killer cattle that brought that price from 24½ cents.

(Testimony of Ray Skelton.)

Q. What is known as common stuff?

A. Any steer of off quality, off breed, Holstein, Jersey or something like that.

Q. Dairy type of cattle? A. That's right.

Q. Not white-faced cattle?

A. No,—that's right. [100]

Judge Baum: That is all.

Cross-Examination

By Mr. Albaugh:

Q. If the White Face cattle were thin they might be classed as common steers?

A. Yes, they could be.

Q. Those cattle that you bought where did they go as feeders.

A. Some of the cattle went to a party in Nebraska, and some to Iowa, I don't know whether they fed or killed them. I don't know whether they resold them or not.

Mr. Albaugh: I guess that's all.

Mr. Olmstead: May we have my letter to you, Mr. Albaugh?

Mr. Albaugh: I will admit that is my letter to you and that the other is your letter to me. I object to the letters as incompetent, irrelevant and immaterial and not binding upon either the defendant or the plaintiff.

Mr. Olmstead: We will call Mr. Ruud for cross-examination, he has been on the stand once.

The Court: Very well.

BERT RUUD,

called by the plaintiff for cross-examination, having heretofore been duly sworn, testified as follows:

Cross-Examination

By Mr. Olmstead: [101]

Q. You are the defendant in this case?

A. Yes, sir.

Q. Mr. Ralph L. Albaugh was your counsel in September, 1947, in reference to the controversy which is the subject of the trial here today?

A. He is.

Q. Was he in,—did you employ Mr. Albaugh and was he your counsel on September 11, 1947, with reference to the controversy now on trial?

A. I don't remember the date I employed him.

Q. Did you give Mr. Albaugh a three thousand dollar check to forward to the American Packing and Provision Company?

A. Yes, sir.

Mr. Albaugh: No, not \$3000.00

Judge Baum: Mr. Albaugh, on September 3rd, —strike that.

Q. Mr. Ruud, at the time you gave him a check for \$3135.00 he was representing you?

A. Yes, sir.

Q. (By Mr. Olmstead): I offer the check at this time, not the check, this letter.

The Court: I think it should be admitted with the provision for the defendant to make any explanation of any knowledge or lack of knowledge he may have had. [102]

(Testimony of Bert Ruud.)

Mr. Albaugh: I would like to make the objection that it is incompetent, irrelevant and immaterial.

Judge Baum: You admit that it is the letter you received.

Mr. Albaugh: Yes, I received that letter and I think it is your signature. I admit I received it.

The Court: I don't think it makes much difference one way or the other but it may be admitted for what it is worth.

Judge Baum: I offer this deposition in evidence at this time.

Mr. Albaugh: Where the witness is here to testify I see no necessity of introducing the deposition. It is, in my opinion, out of order and it is incompetent, irrelevant and immaterial.

The Court: This is the deposition of the defendant himself and I take it you are offering it as a statement against interest.

Judge Baum: Yes, sir.

The Court: It may be admitted. The defendant may explain anything in the deposition.

Deposition of Bert Ruud, taken before Leslie E. Poole, a Notary Public, at Idaho Falls, Idaho, February 24, 1948.

Q. Now, then, was a portion of the purchase price of those cattle paid to you at or about the time the contract was signed? A. No, sir.

Q. Did you ever receive any portion of the purchase price? A. About six weeks later.

Q. And on or about what date, as you recall it?

(Deposition of Bert Ruud.)

A. Oh, between the eighth and tenth of December.

Q. And how much did you receive?

A. Three thousand dollars.

Q. And was that a partial payment of the purchase price of the cattle referred to in the contract?

A. No, sir.

Q. How did you receive that money?

A. Why, Mr. Salerno left it at the hotel, and advised me that he left it there for me to call for it.

Q. Well, did you have any other transactions with this packing company at or about that time, relative to any other cattle?

A. Verbally, yes.

Q. Did you agree to sell other cattle to the packing company? A. Yes.

Q. And what cattle did you agree to sell?

A. Any cattle that I might be able to purchase during the winter.

Q. And those were cattle other than those referred to in the contract? A. Yes, sir.

Q. Now, this three thousand dollars that you received, as you recall some time in December, that was on the purchase price of what cattle?

A. On no particular cattle.

Q. Was it on the purchase of cattle?

A. On cattle that we might be able to buy?

Q. Was it the three thousand dollars that is referred to in the contract?

A. I don't think so, no.

(Deposition of Bert Ruud.)

Q. You think it's some other three thousand dollars that they sent you? A. Yes, sir.

Q. On some other deal? A. Yes, sir.

Q. On what other deal?

A. On some cattle that I might be able to buy, because I couldn't buy the cattle referred to in the contract.

Q. So, you say that the three thousand dollars you got was not the three thousand dollars referred to in the contract?

A. That's right.

Q. But it was for some other cattle that you were going to purchase and deliver to the packing company? A. That's right.

Q. And when were you to deliver those other cattle?

A. That would depend on when I could buy them, and how I could buy them.

Q. Was this contract that the three thousand dollars you received referred to, was that a contract which permitted you to make delivery at any time? A. No, sir.

Q. Then, that's my point. At what time were you to make delivery?

A. There wasn't a set time.

Q. Well, then, you say you were to make delivery at any time?

A. I don't—Do you mean by that, over a period of years?

Q. Well, I am asking you, of course.

A. No.

(Deposition of Bert Ruud.)

Mr. Olmstead: Will you read my last question? I don't know—I don't believe the answer is responsive.

Reporter: (Reading.)

“Question: Well, then, you say you were to make delivery at any time?”

By Mr. Olmstead:

Q. And your answer to that is No?

A. There was no specific time.

Q. Now, then, as I understand, you received this three thousand dollars at the hotel here in Idaho Falls? A. Yes sir.

Q. And do you recall if that was a check of the American Packing and Provision Company?

A. Yes, sir.

Q. And had Mr. Salerno advised you that the check would be left there for you?

A. Yes sir.

Q. And when did he advise you to that effect?

A. Oh, about a day before he left it there.

Q. About a day before? A. Yes.

Q. And was any particular cattle discussed at that time?

A. Just cattle that we might be able to pick up.

Q. So, I understand it, you were negotiating with Mr. Salerno not only for the cattle referred to in the contract, but for other cattle, also; is that correct?

A. No; the cattle referred to in the contract, we were unable to get.

Q. When did you find that out?

A. Oh, after the middle of November.

(Deposition of Bert Ruud.)

Q. After the contract was signed?

A. That's right.

Q. And so you were then dealing with Mr. Salerno for other cattle? A. Yes sir.

Q. I see. So that there were, really, two transactions involved, the first one referred to in the contract, and then a subsequent transaction for the sale of other cattle?

A. Well, the original contract was more or less disregarded.

Q. So that then you proceeded to dicker for other cattle, is that right?

A. I was going to try to, yes sir.

Q. Well, did you? A. Yes sir.

Q. What conversations did you have with Mr. Salerno after this contract was executed?

A. Oh, several.

Q. Can you give me the approximate dates?

A. Before, or after?

Q. After the contract was executed.

A. Oh, each week after—I would meet him each week after the contract was signed, here in Idaho Falls.

Q. Where would you meet him here?

A. Sometimes at the stockyards, and sometimes at the hotel.

Q. You say that you saw him every week after November fourth, Nineteen, forty-six?

A. I believe I saw him every week.

Q. And on each of those occasions you discussed the cattle transactions with him?

A. That's right.

(Deposition of Bert Ruud.)

Q. Was any reference made, in any of those conversations, to the contract that had been signed?

A. Yes sir.

Q. All right, now let's fix the first conversation. When would you say that was?

A. The contract was signed November the fourth?

Q. It bears date of November fourth, yes.

A. I would say within six days after.

Q. And where did you meet him at that time?

A. At the stock yards in Idaho Falls.

Q. And what was the conversation at that time?

A. The conversation was regarding the payment—arranging for the company to pay half on the purchase price of the cattle.

Q. I see. Was anyone else present?

A. Yes, there was several. We were eating at the counter at the stockyards, and there was several boys talking to Mr. Salerno at the same time I was.

Q. Was any other person present, in so far as this conversation was concerned?

A. That I wouldn't know.

Q. You don't know whether anyone overheard the conversation, other than yourself and Mr. Salerno?

A. I don't know, sir.

Q. So, about six or seven days after the contract was signed you were discussing with Mr. Salerno the matter of the packing company advancing a portion of the purchase price for some cattle, is that true?

A. That's right.

(Deposition of Bert Ruud.)

Q. And you state you asked him if the company would advance it? A. Yes sir.

Q. Do you recall what his reply was?

A. He said he would see when he went to Ogden the following week, and let me know; he would see what they would say about it.

Q. And was that the substance of that conversation? A. Yes sir.

Q. Now, then, you saw him about a week later?

A. Yes sir.

Q. Where did you see him then?

A. At the hotel and the yards, both. We talked both places.

Q. On this particular day? A. Yes sir.

Q. Where did you see him first?

A. At the hotel.

Q. And what was the conversation at that time?

A. He said that the company had refused to advance any money for the purchase of the cattle.

Q. Was anything else said?

A. Then I said, "I wonder if they would be interested in loaning me half of the purchase price, at three percent interest?" And he says, "Well, they loan money on cattle, and I think perhaps that maybe we can. I will check it up and see."

Q. Was anything further said at that time?

A. We decided to wait and see whether they would, or not.

Q. Now, this would be about two weeks after the contract was signed? A. Yes.

(Deposition of Bert Ruud.)

Q. Now, you think you saw him the following week?

A. I believe I saw him within the next three days after that.

Q. That was here, in Idaho Falls?

A. Yes sir.

Q. And did you have a conversation with him?

A. Yes sir.

Q. And what was the substance of that conversation?

A. I believe he said he called up the plant, and they wouldn't—they said they wouldn't loan any money on the cattle.

Q. Was anything further said at that time?

A. Well, we were arguing about the way the contract was originally drawed up, and the shrink, and how incomplete it was, and I was getting tired of waiting back and forth about the deal, and I asked him if he wanted the cattle, or if he didn't.

Q. And what did he say?

A. Well, he says, "I'll see."

Q. And was that the substance of that conversation?

A. Yes.

Q. Now, then, when did you have another conversation with him?

A. I believe the next conversation I had with him was on the telephone at Ogden.

Q. And about when was that?

A. About four or five days later.

Q. Would this still be in November?

A. Yes sir.

(Deposition of Bert Ruud.)

Q. And what was that conversation?

A. I went to the packing plant to see him, and he——

Q. You went to the packing company?

A. Yes. And he had gone home, and I called him on the phone.

Q. You were in Ogden at the time?

A. Yes sir.

Q. All right, what was that conversation about?

A. Oh, the whole thing in general, about the cattle.

Q. Well, now, then, as I understand it, the previous—in the previous conversation he said he would see if the company would lend you the money, is that correct?

A. That's right.

Q. All right. Was any determination made about that matter in this telephone conversation?

A. No; that was determined before.

Q. Well, then, you saw him before the last conversation that you—Strike that, if you please. Your last conversation in Idaho Falls, as I recall your having stated it, was at the time you asked him to ascertain if the packing company would loan money on the cattle; is that correct?

A. Yes sir.

Q. All right. Now, when did you get your answer to that?

A. I think two or three days later.

Q. Was that when you were in Ogden?

A. No, sir.

Q. Oh, I see. All right, let's get to that conversation. Were you—Was that a telephone conversation?

A. Yes, sir.

(Deposition of Bert Ruud.)

Q. Were you in Idaho Falls at the time?

A. No, I was at Ogden.

Q. You were in Ogden at that time?

A. Yes, sir.

Q. You talked to him on the telephone?

A. Yes, sir.

Q. And what was that conversation?

A. Oh, regarding the purchase of some cattle.

Q. Did it relate to this matter of your borrowing money? A. No.

Q. You didn't ask him about that? A. No.

Q. I see. Then, when did you get your answer from him that the packing company wouldn't lend you the money, if ever?

A. Two or three days after I asked him to see if they could do it. Either two or three days, as I stated.

Q. Over the telephone in Ogden?

A. No; right here.

Q. Oh, I see. Right here in Idaho Falls?

A. Right here in Idaho Falls.

Q. Now, your next conversation was over the telephone in Ogden? A. Yes, sir.

Q. And at that time you discussed cattle generally? A. Yes, sir.

Q. Was that about the size of it?

A. Yes, sir.

Q. Do you recall anything specific?

A. Well, we didn't have the cattle purchased, and I told him, and he said he would meet me in Idaho Falls, and we would talk it over. That was

(Deposition of Bert Ruud.)

along about the first of December, and he came back up, and we talked it over, and that's when this check deal came up.

Q. Then about the first of December you had a conversation with him here in Idaho Falls?

A. It was around the first week in December.

Q. And where was that conversation?

A. At the hotel.

Q. That is which hotel?

A. The Rogers Hotel. All of these conversations were at the Rogers Hotel.

Q. Was anyone present at that time, other than yourself and Mr. Salerno?

A. Not that I know of, that would be interested in listening.

Q. You mean not that overheard the conversation?

A. I would say no.

Q. All right. Now, what was that conversation?

A. That was regarding the purchase of cattle.

Q. What was said, if you recall it?

A. Well, I said, "This deal has been going on a long time, and we haven't filled any part of the contract, and there's no money up on it," and I asked him what we should do. And he suggested that I accept the check, and try to buy some cattle during the winter, between two- and three hundred head of cattle, and he said he would leave the check there for me to pick up.

Q. Up to that time you had obtained no cattle?

A. No.

Q. Did you have any cattle at your ranch at that time?

(Deposition of Bert Ruud.)

A. During that time I was cleaning up some fat cattle I had at the ranch.

Q. Then, in this conversation early in December Mr. Salerno said that he would leave the three thousand dollar check at the hotel, and that you could pick it up there, is that correct?

A. That's right.

Q. And the check was left there, and you picked it up, is that right? A. That's right.

Q. What did you do with the check?

A. I deposited it.

Q. When did you next see Mr. Salerno?

A. I don't think I saw him any more until the first week in August the following year.

Q. So, while you saw him every few days during the month of November, and the fore part of December, you didn't see him again for a matter of seven or eight months, is that true?

A. Yes, sir.

Q. You had no further conversation with him about the contract, or any other cattle, subsequent to the time that you received the check until in August, is that right?

A. I believe that's correct.

Q. Now, then, what cattle did you have in August of Nineteen forty-six?

A. I had several steers that I had pastured on my place.

Mr. Albaugh: Do you mean Nineteen forty-six?

A. That's what he said, Nineteen forty-six.

Q. (By Mr. Olmstead): Yes, August, Nineteen forty-six. Several steers?

(Deposition of Bert Ruud.)

A. Yes, I had—I had been selling cattle all through August, and I had, I would say, about a hundred head.

Q. Let me preface this line of questioning with this question: When did your negotiations with Mr. Salerno relative to a possible sale of cattle first commence, if you recall?

A. He tried to buy some of those cattle that were out on the ranch in August.

Q. Of Nineteen forty-six?

A. Of Nineteen forty-six.

Q. And about how many cattle did you have at that time?

A. Oh, I would say thirty, or forty, or fifty head; somewheres along there.

Q. Thirty to fifty head? A. Yes.

Q. Now, then, during September, do you recall what cattle you had, September of Nineteen forty-six?

A. Well, I had around a hundred and fifty.

Q. You were buying cattle, then, during that period? A. Buying and selling.

Q. Now, what about October, Nineteen forty-six, what cattle did you have?

A. I had some of those same cattle left.

Q. Some of this hundred and fifty?

A. No, some of those that was on the ranch.

Q. Some of this thirty to fifty? A. Yes.

Q. You had some of those left? A. Yes.

Q. Now, what about the hundred and fifty that you had in September?

A. I had sold part of those.

(Deposition of Bert Ruud.)

Q. Those were gone? A. Yes.

Q. Do you have a recollection as to about how many cattle you had in October, Nineteen forty-six?

A. Well, I had been buying quite a few fat cattle in August, Nineteen forty-six, and sometimes they would go to the ranch, and sometimes they would go direct.

Q. Was that true in October, Nineteen forty-six? A. Yes.

Q. Well, have you an estimate of the number of cattle you had at that time?

A. Oh, I may have handled two- or three hundred.

Q. You think in October you may have had two- or three hundred cattle? A. Yes.

Mr. Albaugh: Did you say had, or handled?

A. I said handled.

Q. (By Mr. Olmstead): Handled two- or three hundred? A. Yes.

Q. By that you mean you handled them at the ranch?

A. Yes, fed them and sold them out.

Q. What brands do you own, Mr. Ruud?

A. Just one.

Q. And what is that brand? A. Bar-R.

Q. You don't own the O L Hip brand?

A. No, sir.

Q. Do you know whose brand that is?

A. No, sir.

Q. Have you ever seen it? A. Yes, sir.

Q. But you don't know whose it is?

A. No, sir. It's not O L Hip. It's O Left Hip.

(Deposition of Bert Ruud.)

Q. O Left Hip? A. Yes.

Q. All right, to be specific, do you own the O Left Hip brand? A. No, sir.

Q. And you don't know who does own that brand? A. No, sir.

Q. Have you ever seen it on cattle in this area?

A. Yes, sir, in several areas.

Q. Cattle bearing that brand are quite prevalent through this territory? A. Yes, sir.

Q. But you don't know whose they are?

A. They may be several different—have had several owners.

Q. Now, then, in October of Nineteen forty-six, you handled at your ranch, as I understand it, from two- to three hundred head of cattle?

A. That's right.

Q. Now, what about November, Nineteen forty-six?

A. I may have marketed some of those cattle, that I had in October, in November.

Q. Do you have any recollection of it?

A. Just vaguely.

Q. Do you have any records? A. Yes.

Q. Do you have your records with you?

A. No.

Q. You do have records, however, of your cattle marketings during the fall of Nineteen forty-six?

A. Yes, I have records of all of my cattle marketings.

Q. And all of your cattle purchases?

A. That's right.

(Deposition of Bert Ruud.)

Q. And you think that you may have disposed of some of those two- or three hundred head of cattle, that you had in October, in November?

A. That's right.

Q. Did you ever use that O Left Hip brand on any of your cattle? A. Yes.

Q. And was that brand on any of those cattle that you had in the fall of Nineteen forty-six?

A. No, sir.

Q. When had you used that brand before?

A. Oh, several different times.

Q. In Nineteen forty-five?

A. Several years I have used it.

Q. Well, in Nineteen forty-five?

A. I couldn't say for sure.

Q. In Nineteen forty-four?

A. I might have.

Q. Well, do you have any recollection as to when you did use it before? A. No.

Q. Except that you know that you have used it?

A. That's right.

Q. But you didn't use it in Nineteen forty-six?

A. No, sir.

Q. Now, then, in December of Nineteen forty-six, did you have any cattle on your ranch?

A. No, sir.

Q. They were all gone by then?

A. Yes, sir.

Q. Will your records show, Mr. Ruud, the number of head of cattle you had on November third, Nineteen forty-six?

(Deposition of Bert Ruud.)

A. It will show how many cattle I sold during that month.

Q. Will it show how many cattle you had on hand on that date? A. No, sir.

Q. Do you have any records that will show that?

A. Not specific that I could tell for sure, because we marketed so many from one month to another.

Q. Your operation is a large operation, I take it, is is not? A. That's right.

Q. You deal in large numbers of cattle?

A. Oh, I wouldn't say that.

Q. Well, you mean by that it is a large operation, but you don't deal in large numbers of cattle?

A. Well, I deal in a few each month. It's not a large operation, I wouldn't call it. It's just a general operation.

Q. Well, the word is relative, of course, but would you consider, as far as your operations are concerned, that a contract for the sale of three hundred head is a large operation?

A. All at one time, yes.

Q. So, that transaction was a little unusual for you, is that right? A. That's right.

Q. You have sold cattle in that number before, have you not? A. Not all at one time, no.

Q. So, you say that by December first, Nineteen forty-six, you had gotten rid of all your cattle?

A. That's right.

Q. These cattle you had in November, Nineteen forty-six, what kind of cattle were they?

A. Beef cattle.

(Deposition of Bert Ruud.)

Q. Were they fed cattle?

A. Fat cattle and fed cattle. I don't feed grain to no cattle; just grass fed cattle, and hay fed cattle.

Q. What kind of cattle were you selling under the terms of this contract to the packing company?

A. The original deal, as we drew it up, would have been good cattle, had we completed the deal.

Q. Now, then, what do you mean by "good cattle," are you speaking of grade now?

A. No, I mean quality.

Q. A good quality cattle? A. That's right.

Q. What size of cattle?

A. Oh, the cattle would weigh about five hundred and twenty-five pounds.

Q. That's what you had in mind?

A. Yes, sir.

Q. Taking them in the fall of Nineteen forty-six, for delivery the following fall?

A. That's right, yes, sir.

Q. You proposed to feed them there on your ranch?

A. I proposed to pasture them on my ranch, and fatten them in the year Nineteen forty-seven.

Q. And what did you propose to do with them during the fall and winter of Forty-six and Forty-seven.

A. The purchaser was to care for them, and I was to receive them in the spring.

Q. Now, what purchaser is this?

A. I was the purchaser.

(Deposition of Bert Ruud.)

Q. Well, I understood you to say the purchaser——

A. I answered that wrong.

Q. You means the seller? A. The seller.

Q. And what seller did you have in mind?

A. Some fellows by the name of Peterson Brothers.

Q. And where are they located?

A. In Jackson.

Q. So, when you were negotiating with Mr. Salerno for the sale of the cattle covered by the contract, you had in mind that you would acquire the cattle from Peterson Brothers, is that right?

A. Yes; I had a contract up there, and some money, a check there, waiting on the deal.

Q. How many cattle were involved in your contract with Peterson Brothers?

A. Three hundred.

Q. Three hundred head? A. Yes.

Q. Was the brand the O Left Hip brand, do you know? A. No, sir.

Q. Had you seen these cattle that you were buying from Peterson Brothers? A. Yes, sir.

Q. And do you recall what they were branded?

A. They had four or five brands on, because they were owned by four or five brothers.

Q. Was that a written contract that you had with Peterson Brothers? A. Yes, sir.

Q. Do you have a copy of that written contract?

A. No.

Q. Did you ever have a copy of it? A. No.

(Deposition of Bert Ruud.)

Q. Did Peterson Brothers have a copy of it?

A. Yes.

Q. But you never did have one? A. No.

Q. Had you signed it? A. Yes.

Q. And these cattle that you were to get from Peterson Brothers would have weighed about five hundred and twenty-five pounds, is that right?

A. Approximately.

Q. As of what date? A. As of December.

Q. As of December of Nineteen forty-six?

A. Yes.

Q. Now, under your contract with Petersons when were you to get delivery of those cattle?

A. In June of Nineteen forty-seven.

Q. Do you know what the Peterson brothers' first names may have been?

A. Oh, I know them all——

Q. Do they operate their ranching business under this name? A. Yes, sir.

Q. Peterson Brothers, at Jackson's Hole?

A. No, Jackson, Montana.

Q. Oh, Jackson, Montana. Now, you had, as I understand it, three hundred head contracted for from Peterson Brothers, which you were to get delivery of in June, Nineteen forty-seven?

A. That's right.

Q. You had in mind when you got delivery of those cattle to pasture them at your ranch at Irwin? A. That's right.

Q. And then deliver them to the packing company in August and September, as called for under the contract with the packing company?

A. Yes, sir.

(Deposition of Bert Ruud.)

Q. Under normal feeding conditions, such as you had in mind, what would those cattle have weighed at the time of their delivery to the packing company in the fall of Nineteen, forty-seven?

A. About nine hundred pounds.

Q. And these cattle would have graded what, in your judgment, when delivered to the packing company in the fall of Nineteen, forty-seven?

A. That would all depend on the season. You never can guess that far ahead, and how they would do during the winter. It was a year from the time the deal was made until they might be delivered, had we completed the deal.

Q. But, as I understand it, in your judgment they would have been good cattle?

A. That's right.

Q. But, as to whether they would have graded A's, or Double A's, or B's, you wouldn't venture an opinion on that?

A. I wouldn't venture an opinion.

Q. So, when you made this contract with the packing company, which is dated December—or dated November fourth, Nineteen forty-six, you had the specific cattle under contract which you proposed to fill that contract with?

A. I had had a partial agreement and a contract, and left a check with the Brothers for them to decide. I couldn't fully decide, because I hadn't fully closed the deal with Salerno.

(Deposition of Bert Ruud.)

Q. I understand that, but you had a written agreement with Peterson Brothers?

A. Yes, sir.

Q. And it was the Peterson Brothers cattle that you were going to fill the packing company's contract with?

A. Yes, sir.

Q. And then Peterson Brothers, for some reason or other, fell down on their deal with you, is that it?

A. Yes, sir.

Q. When did you find out that Petersons wouldn't make good under their contract?

A. I believe along about the fifteenth, between the tenth and the fifteenth of November.

Q. Of what year?

A. Nineteen, forty-six.

Q. And was that by virtue of a letter of some sort?

A. No, that was partly because I was stalling on the deal, and partly because the price of cattle was raising so fast that they decided not to sell them.

Q. Did you make any attempt to pursue your remedies under this contract with Peterson Brothers?

A. In what way?

Q. To enforce delivery—to enforce that contract?

A. No; my date had expired, and I couldn't.

Q. Well, you were to take delivery in June, Nineteen forty-seven, were you not?

A. Yes, but I didn't have the—didn't have all their signatures.

(Deposition of Bert Ruud.)

Q. Oh, I see. And it was about November fifteenth, Nineteen forty-six, when you ascertained that you probably wouldn't be able to get the Peterson Brothers cattle, is that right?

A. I wouldn't give the date exact, but I think it was about that time.

Q. It was after the fourth day of November?

A. Yes.

Q. You had seen these cattle that you proposed to get from Peterson Brothers?

A. Yes, sir.

Q. And knew their size, and their quality and condition?

A. Yes, sir.

Mr. Olmstead: That is all of Mr. Ruud at this time.

Mr. Albaugh: No questions. [103]

E. W. FALLENTINE

Called as a witness for the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Olmstead:

Q. Where do you reside Mr. Fallentine?

A. Ogden, Utah.

Q. Your occupation?

A. Vice-president and General Manager American Packing and Provision Company.

Q. That is the plaintiff in this action?

A. Yes, sir.

Q. How long have you held that position?

A. Since 1937.

Q. You are familiar with the contract which is the subject of this action, and which has been received in evidence as exhibit number 1.

A. I am.

(Testimony of E. W. Fallentine.)

Q. I will ask you if any deliveries have been made by the defendant Ruud under that contract to your company?

A. No cattle have been delivered under this contract.

Q. Mr. Fallentine, did you state how long you had held this position with the American Packing and Provision Company, the plaintiff here?

A. Since 1937. [104]

Q. What was your occupation before that?

A. I have been with the company in various capacities.

Q. And as General Manager since 1937?

A. That is correct.

Q. How many cattle a year are processed through this plant?

A. Thirty-four to 36 thousand head.

Q. What is the average dressed weight yield, percentage wise of good quality steers?

Mr. Albaugh: We object to this there is nothing to say the cattle under the contract must be of good quality.

The Court: He may answer.

A. U. S. good quality steers in order to grade "good" will have to yield between 56 and 61 per cent.

Q. You mean the dressed weight is 57 to 61 per cent of the live weight?

A. Yes, that is correct.

Q. If a live animal weighed 1,000 pounds then the dressed weight would be 570 to 610 pounds?

A. That is right.

(Testimony of E. W. Fallentine.)

Q. Do you know the mathematical formula for converting 17½ cent live weight price into dressed weight price, basing the yield, for example on 59 per cent? A. Yes, sir.

Q. What is that formula? [105]

Mr. Albaugh: We object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. Fifty-nine divided into seventeen and a half would give the cost of the animal dressed. That would be the cost of the animal dressed but other things enter into the picture.

Q. What I am getting at is that the 17½ cent a pound price live weight is converted into the dressed cost by that formula.

A. Dividing fifty-nine into seventeen and a half.

Q. And to convert dressed weight back to live weight, what is the formula?

A. You multiply by 59.

Q. To convert dressed weight back to live weight cost you multiply instead of divide.

A. You multiply the dressed weight by the percentage—that is the dressed weight price by the percentage.

Q. So if you had a dressed weight price of 29.66 and a yield of 59 per cent, you multiply 29.66 times 59 to convert it to live weight price.

A. That's right.

Q. What would you get.

A. Seventeen fifty.

(Testimony of E. W. Fallentine.)

The Court: I would like to know a little [106] more clearly than it is in the record how you do this, how it works.

A. Well, if an animal costs $17\frac{1}{2}$ cents a pound and the yield is 59 per cent, then you divide 59 into $17\frac{1}{2}$ and that would be the cost of the animal dressed. The animal only yields, if he is a thousand pound animal, he only yields 590 pounds dressed and consequently you take the 59 per cent and divide it into $17\frac{1}{2}$ and it makes the cost of the live animal, or live weight 29 cents or whatever it comes to, or might be, when dressed.

Q. And the same would be true whatever you paid live weight for the animal.

A. Yes, and whatever the yield was, if he weights a thousand pounds and when we killed it weighed 570 pounds then the yield would be 57 per cent and if it weighed 560 dressed, it would be 56 per cent, and so you divide the yield into the cost, live weight to get the cost dressed weight.

Q. And to convert the dressed back to live weight, you multiply the 59 or whatever the per cent is by $17\frac{1}{2}$ if that was the live weight.

A. Yes, I think that is the correct figure here.

Mr. Olmstead: Is that clear your Honor.

The Court: It is clearer than it was before.

Mr. Olmstead: That is all, you may examine.

Cross Examination

By Mr. Albaugh:

Q. Now, this three per cent shrinkage, what is that figured on, would that be computed on the live weight?

(Testimony of E. W. Fallentine.)

A. Three per cent on the live weight, is that what you said.

Q. That is three per cent of the dressed weight isn't it Mr. Fallentine?

A. Three per cent on the 29.66 price, on the dressed weight.

Q. That would be shrinkage on the dressed weight?

A. That would be the three per cent shrinkage.

Q. As a matter of fact, three per cent shrinkage deducted from the dressed weight is equal to more than five per cent deducted from the live weight in dollars and cents isn't it?

A. Can I explain this. Normally a thousand pound steer that yields 600 pounds hot weight shrinks and that has been determined by packing houses throughout the United States to be a certain percentage. Over a number of years the packing industry through their experience shows that an animal will shrink that amount from hot weight to cool weight.

Q. My question is what the shrinkage would amount to, not why it would amount to some figure.

The Court: According to this it would amount to 18 pounds.

A. It would be on a 59 or 60 per cent yield.

Q. That would be on a thousand pound steer.

A. Yes, taking a thousand pound animal.

Q. Somewhere around \$6.00 a head.

A. That would be about right.

(Testimony of E. W. Fallentine.)

Q. Mr. Fallentine, you testified that no delivery was made by Mr. Ruud under this contract.

A. Under this contract there was no delivery.

Q. Did Mr. Ruud ever make an offer to deliver to you under this contract?

A. None whatever.

Q. Did you receive a letter under date of August 22, 1947 from Mr. Ruud?

A. I would like to see the letter so I may testify intelligently. This letter I have read but I did not read it at the time of the contract.

Q. Will you read it now? A. I have.

Q. Who is it addressed to?

A. To Louie Salerno.

Q. Attention of Mr. Salerno?

A. No, it is addressed to Mr. Salerno.

Q. Is that the letter of August 27th?

A. No, November 12. This was not read by me until the last trial, that is, the first trial here, that was the first time I saw this letter. This one I have now, is addressed to American Pack attention Mr. Salerno. Mr. [109] Salerno did tell me over the phone about this.

Mr. Albaugh: May we have it marked.

Q. Calling your attention to exhibit 11, that is a letter that was received by the American Packing and Provision Company. A. Yes sir.

Q. And it was in their possession from shortly after it was dated so far as you know?

A. I believe that Mr. Salerno kept this in his files, I don't remember it in our files.

(Testimony of E. W. Fallentine.)

Q. Mr. Salerno was your buyer?

A. Yes sir.

Q. He was handling this Ruud transaction.

A. Just buying, he hasn't authority to buy on contract without my signature. I am the only one authorized to do that.

Mr. Albaugh: We offer in evidence at this time, exhibit 11.

Mr. Olmstead: Objected to as incompetent, irrelevant and immaterial, it is not a offer to deliver under the contract at the contract price, but to deliver some cattle and some price in excess of the contrate price.

The Court: It seems that this is a proposal to deliver cattle at a different price. I will admit it and such parts as are incompetent, I will disregard.

Mr. Albaugh: I call the Court's attention to the last part of paragraph 3.

The Court: The letter will be admitted for what it is worth, under the conditions, as I have heretofore stated, I have been very liberal here and I will permit this to go in at the present time.

DEFENDANT'S EXHIBIT No. 11

Irwin, Idaho, Aug. 22, '47.

American Packing and Provision Co.,
Ogden, Utah.

Attention L. Salerno:

With reference to our different talks on this cattle contract wish to submit the following to try to fill the contract.

(Testimony of E. W. Fallentine.)

In as much as we did not get the cattle referred to in the contract I am willing to let you have the cattle we have at the ranch delivered to Ogden and weighed off trucks at 19 cents per lb. and ship only what will Grade A or better and you can grade them here or I will sort them as we ship them and you can start to take them any time now and string them out as you wish.

As I have explained to you these cattle stand me this much and as the prices rose so fast after we made the deal and so many cattle that I expected to fill this deal with went back on their deal and I did not get them as I explained to you when here, and therefor I am willing to let you have these at cost or if you cannot use them at that I will put in other cattle by First of Oct. and get rid of these.

You have never seen these steers yet only in the 9 head that you purchased in Idaho Falls that were my Son's and the balance will compare to them only they are getting better each day.

Yours truly,

/s/ Bert Ruud.

Mr. Albaugh: That is all.

Redirect Examination

By Mr. Olmstead:

Q. Mr. Fallentine will you refer to exhibit 12 and tell us what is that? A. It is a letter.

Q. Addressed to whom?

A. American Provision Packing Company.

Q. What is the date of that? -

(Testimony of E. W. Fallentine.)

A. August 28, 1947.

Q. Whose signature does that purport to bear?

A. Bert Ruud.

Mr. Olmstead: We offer in evidence exhibit 12 if the Court please?

Mr. Albaugh: We have no objection to the introduction of exhibit 12 as to the face of the letter but there is some hand writing on the back by some person. That, of course, will not be admitted without objection.

Mr. Olmstead: That is not to be a part of the offer. [111]

The Court: I think that is understood, that the writing on the back of the exhibit is not to be considered. It may be admitted.

Mr. Olmstead: We rest at this time.

Mr. Albaugh: The defendant moves that the action be dismissed on the ground that the evidence does not show that the contract was ever delivered, but on the contrary it affirmatively shows that the contract was never delivered. There was never a meeting of the minds or mutuality, and it shows that there were still points of dispute between the plaintiff and the defendant in regard to the terms of the contract, and we move for a dismissal on the further ground that the subject matter of the contract has never been identified; that it is impossible to ascertain from the contract or from any evidence before the court, the age of the cattle in question; the weight of the cattle or the type of the cattle and without these matters and these

facts before the Court it is impossible to compute damages and any damages that might be computed must be based upon conjecture and not on the contract or the evidence before this Court. We move for dismissal of the action on the further ground that the plaintiff has failed to prove a cause of action or any damages in this case. We further move for a dismissal of the action on the ground that the plaintiff [112] has failed to prove performance. Plaintiff alleges in its complaint that it had done and performed everything required to be done and performed in the contract and we have denied that and there is no proof before the Court on the part of the plaintiff that they ever paid the \$3,000.00 required to be paid by and under the contract.

The Court: What is the record on the \$3,000?

Mr. Olmstead: The contract acknowledges receipt of \$3,000, and the letter of Mr. Albaugh's recites that last November \$3,000 was paid by the plaintiff to this defendant under this contract and for certain reasons he is tendering it.

The Court: You are satisfied with the condition of the evidence.

Mr. Albaugh: I differ with counsel on my letter.

The Court: The motion is overruled, you may proceed with your case. I want to weigh all these questions which are by no means free from doubt in the Court's mind but that is a matter to be considered in the ultimate decision of the Court.

Mr. Albaugh: We will call Mr. Salerno as an adverse witness.

LOUIS SALERNO

Called by the defendant, after being first duly sworn, testifies as follows: [113]

Cross Examination

By Mr. Albaugh:

Q. Your name is Louis Salerno?

Mr. Olmstead: We object to this witness being called as an adverse witness under the rules of this Court the managing agent may be called as an adverse witness. Certainly they must show first that Mr. Salerno is a managing agent.

The Court: Counsel may proceed with his questions and we will see. He may answer the question.

Q. You may state your name.

A. Louis Salerno.

Q. Your age. A. Forty-three.

Q. Your occupation?

A. Livestock buyer for the American Packing and Provision Company.

Q. As livestock buyer what are your duties?

A. I am in charge of the buying of livestock for slaughtering and feeding for the American Packing and Provision Company.

Q. How many men do you have under you?

A. Three.

Q. How many men did you have, in the fall of 1946, working under you? A. Three.

Q. In August and September 1947, how many did you have under you? A. Three. [114]

Q. Then you are the Chief livestock buyer for the American Packing and Provision Company and these men work under you?

A. I am head buyer.

(Testimony of Louis Salerno.)

Q. You and the men working under you buy all the livestock for the corporation?

A. Our daily purchases, yes sir.

Q. Did you negotiate for the plaintiff corporation, this contract that is in dispute in this case?

Judge Baum: Now, we renew our objection this is not a witness that comes within the rule.

The Court: They can make him their own witness, this witness does not come within the rule.

Mr. Albaugh: I take it that he would come under the hostile witness rule.

The Court: You may ask leading questions.

Judge Baum: But he is calling him as his own witness.

The Court: That's right, he is the defendant's witness. A. To a certain extent, yes sir.

Q. To your knowledge did Mr. Ruud ever see any other officer of the corporation?

A. No sir.

Q. So that you were the one that handled all of the conversations [115] and contacts with Mr. Ruud in negotiating this contract?

A. Yes sir.

Q. Then in the summer of 1947 in August you went to the Ruud Ranch? A. Yes sir.

Q. And you looked at the cattle he had on the ranch? A. From the road.

Q. I think you bought some of those cattle for the American Packing and Provision Company later? A. Yes sir.

(Testimony of Louis Salerno.)

Q. Now, Mr. Salerno, those cattle he had on the ranch were Wyoming cattle were they not?

A. From the description given here, yes. Yes sir, from the description given this morning.

Q. When this contract was negotiated with Mr. Ruud you knew that Mr. Ruud had no cattle on his ranch? A. Yes sir.

Q. This contract was made from notes and instructions that you gave to the plaintiff's attorney in Ogden, Utah was it not? A. Yes sir.

Q. Was Mr. Olmstead that attorney?

A. Yes sir.

Q. You knew that Mr. Ruud had no cattle on the ranch when the [116] contract was made, did you not?

A. When we was first dealing, yes, but when he signed the contract I presume he had the cattle.

Q. You knew did you not that Mr. Ruud had no feed on the ranch to feed cattle, and that it was strictly a grazing proposition?

A. Yes sir.

Q. You knew he didn't intend to keep any cattle that winter.

A. I didn't know where he was going to winter them. He told me he would **have to buy** hay to winter the cattle.

Q. Your deposition was taken on the 27th of January, 1948 in this action, was it not?

A. Yes I guess that was the date.

Q. You say now that you presume or thought that Mr. Ruud had cattle on the ranch when he signed this contract.

(Testimony of Louis Salerno.)

A. I presume he had the cattle bought because he wrote a letter stating that he had the cattle bought.

Q. It also stated that he had some to receive yet.

A. Yes.

Q. But you knew that he didn't intend to feed them on the ranch that winter?

A. I don't know where he was going to winter them.

Q. You knew there was no hay to feed them?

A. I knew that he could buy hay and haul it in.

Q. You have been buying cattle for many years?

A. Yes sir. [117]

Q. And you knew that it wasn't feasible?

A. As a rule it usually is that they feed the cattle where they buy the hay, yes sir.

Q. And Mr. Ruud never attempted to feed cattle on the ranch, you knew that. A. No sir.

Q. Didn't you discuss that with him?

A. No sir.

Q. Why did you have the attorney insert in this contract that there was 300 head of cattle branded O left hip, on that ranch?

A. We always put the brand in the contract.

Q. Three hundred head of cattle on the ranch, why did you have that inserted in the contract?

A. When I was dealing with Mr. Ruud he said he would have the cattle, he would buy the cattle and we left a blank space for the brand.

Q. Why did you have the attorney for your company state there was 300 head of cattle on the ranch?

(Testimony of Louis Salerno.)

A. From my conversation with Mr. Ruud, he was to buy that many cattle.

Q. Then he was to bring them to the ranch?

A. Yes sir.

Q. That was your understanding.

A. Yes sir. [118]

Q. When was he to bring them to the ranch?

A. There was no specific time when he was to bring them to the ranch.

Q. You remember your testimony on that deposition I mentioned?

A. Yes, I remember the deposition.

Q. Now, will you take the deposition which has been handed to you, at page 16 down to the bottom of page 16, the question there from me directed to you Mr. Salerno: "I believe you just stated it was your understanding that he was to winter them in Wyoming and bring them to his ranch in the spring?" and your answer: "That is what Mr. Ruud told me; yes sir."

Judge Baum: We object to this form of examination, it is apparent he is seeking to impeach this witness.

The Court: There could be no other purpose.

Judge Baum: And we object as it is improper, within the rule.

The Court: I think it is unless you bring the witness within the rule.

Q. Mr. Salerno, you were still the head cattle buyer for the American Packing and Provision Company in August, 1947?

A. Yes sir.

(Testimony of Louis Salerno.)

Q. And that is the plaintiff corporation?

A. Yes sir. [119]

Q. You were negotiating with Mr. Ruud in regard to the delivery of the cattle were you not?

A. Yes sir.

Q. And you went to his ranch to see him?

A. Yes sir.

Q. And you called him on the telephone at Afton, Wyoming? A. Yes sir.

Q. Now, were you instructed to go and see Mr. Ruud at that time, by your company?

A. Yes sir.

Q. Were you instructed by your company to attempt to negotiate with Mr. Ruud over the delivery of some cattle?

A. Yes, I was there to receive the cattle.

Q. You did that did you? A. Yes sir.

Q. Did you demand from Mr. Ruud these Wyoming cattle that he had on that ranch?

A. I demanded the cattle that he was to fill the contract with?

Q. What cattle?

A. I never saw the cattle.

Q. You never did see the cattle under the contract? A. No sir.

Q. These Wyoming cattle on the ranch were not the cattle covered by the contract were they?

A. They were not carrying the branch that the contract called for, no sir.

(Testimony of Louis Salerno.)

Q. You didn't claim at that time that these cattle on the ranch were cattle covered by your contract?

A. No sir, we had no way to prove it.

Q. You have heretofore stated they were not the cattle? A. I had never seen the cattle.

Q. Just answer the question. You have heretofore stated that they were not the cattle covered by the contract?

A. They were not branded with the brand covered by the contract.

Q. You are pretty well acquainted with the cattle all through that country? A. Yes sir.

Q. The reason you didn't demand these cattle was because you knew they were not the cattle covered by the contract, is that true?

A. Well—

Q. Just answer the question yes or no.

The Court: I think the witness should have more latitude than a yes or no answer.

Q. I think you stated you didn't demand the cattle on the ranch under this contract.

A. No sir.

Q. Why didn't you demand them? [121]

Judge Baum: We submit this is immaterial.

The Court: He may answer.

A. I couldn't demand those cattle because they didn't carry the brand the contract called for.

Mr. Albaugh: Now Mr. Bailiff will you hand the witness the letter dated October 31, 1946 from the witness to Mr. Ruud?

(Whereupon exhibit was handed to witness.)

(Testimony of Louis Salerno.)

Q. Is that your signature on that letter?

A. Yes sir.

Q. What exhibit is that?

Mr. Clerk: This will be exhibit 13 when it is marked.

Q. Is that the letter that accompanied the contract which is exhibit 1, when you sent the contract to Mr. Ruud? A. Yes sir.

Mr. Albaugh: We offer in evidence at this time exhibit 13.

Mr. Olmstead: We have no objection.

Q. Now, you have a letter from Mr. Ruud addressed to Mr. Salerno, dated November 12, 1946 will you state what that is please?

A. It is a letter from Ruud to myself.

Q. You received it, did you? A. Yes sir.

Q. You delivered it to your company?

A. As to whether anybody else read it I couldn't say. I had it filed at my desk.

Q. You were working as the head cattle buyer for the American Packing Company?

A. Yes sir.

Q. You received this letter at the office of the American Packing and Provision Company, at Ogden, Utah? A. Yes sir.

Q. Where was it kept? A. At my desk.

Mr. Albaugh: We offer exhibit 14 in evidence.

Mr. Olmstead: We object on the ground that it is incompetent, irrelevant and immaterial. It is subsequent to the execution of the contract and cannot operate to vary the terms of the contract.

(Testimony of Louis Salerno.)

Mr. Albaugh: It very clearly shows that there was no meeting of the minds and no consummation of the contract at that time.

The Court: This letter does have some bearing on the letter that accompanied the contract at the time the defendant returned it as regards the three per cent shrink. For that purpose it may be admitted.

DEFENDANT'S EXHIBIT No. 14

Headquarters Sixth Army
Office of the Commanding General
Presidio of San Francisco, California

[In black pencil] as to 3% shrink.

Irwin, Idaho, Nov. 12, '46.

Mr. Louie Salerno,
Ogden, Utah.

Dear Sir,

I am in receipt of your letter relative the contract and I cannot see how I can make these cattle yield 59 when I have to take a 3% shrink on the dressed weight as last year they yielded 60 plus off cars at L. A. and weighed as soon as they were peeled and you can cite the difference Ogden.

Now, can't we make this contract read 30 cents for A 32 cents for AA and 28 for B grade, and figure on just the dressed weight and cut the shrink to 1½% as some Packers I find shrink from this to 2½% I am suggesting this to try to get to the point of our verbal agreement and if you will let me know where I can meet you I will try to or I

(Testimony of Louis Salerno.)

may come to Ogden next week if you will be home let me know and we will try to get this closed.

Yours truly,

/s/ BERT RUUD.

Q. Now Mr. Salerno, this letter marked exhibit 15 what is that exhibit? [123]

A. A letter from myself to Mr. Ruud.

Q. Is that your signature? A. Yes sir.

Q. You were still negotiating with Mr. Ruud for the American Packing and Provision Company?

A. Yes.

Q. And in the employ of the American Packing and Provision Company? A. Yes sir.

Mr. Albaugh: We offer in evidence exhibit 15.

Mr. Olmstead: We object to it as incompetent, irrelevant and immaterial and subsequent to the execution of the contract. No authority is shown on the part of this witness to vary the terms of the contract or make any additional contract. The contract was between this defendant and the managing officer of the company.

The Court: Objection sustained.

Q. During this correspondent from November 4 to November 15 were you discussing the contract with the officers of your company?

A. They had drawn up the contract, that was the way I mailed it to him. I couldn't change it and I so stated to him. I don't have authority to change any contract.

Q. When did your authority cease?_-

A. On future purchases Mr. Fallentine has to sanction all contracts. [124]

(Testimony of Louis Salerno.)

Q. Then these letters—withdraw that please—finally along in December there was a check left at the Rogers Hotel? A. Yes sir.

Q. Who left that there? A. I did.

Q. Was that after your authority ceased—I will withdraw the question.

Mr. Albaugh: I think that is all at this time, however, I would like to have the right to recall the witness later.

Judge Baum: If we understand that the witness is to be recalled may we have the right to reserve our cross examination until that time?

The Court: If he is not called, then you will have to recall him for cross examination.

Judge Baum: May we reserve that right?

The Court: I think so. I think we will recess

Q. He mailed that one back? [127]

May 26, 1948, 10 o'clock a.m.

Mr. Olmstead: I think we will go ahead with the cross examination of Mr. Salerno with the Court's permission.

The Court: Very well.

Cross Examination

By Mr. Olmstead: [125]

Q. Mr. Salerno when you first commenced your negotiations with Mr. Ruud in respect to these cattle mentioned in the contract in October 1946—

A. Yes sir.

Q. I hadn't finished the question.

A. Pardon me.

Q. When you commenced the negotiations in October what was the occasion for this first con-

(Testimony of Louis Salerno.)

versation was it a matter brought up by Mr. Ruud or by you? A. Mr. Ruud.

Mr. Albaugh: That is not proper cross examination and we move it be stricken—that the answer be stricken for the purpose of objection.

The Court: Overruled.

Q. Mr. Ruud approached you?

A. Yes sir.

Q. Where was that?

A. At the hotel in Idaho Falls.

Q. When was that?

A. Along the first of October.

Q. Did you have a conversation with him at that time? A. Yes sir.

Q. State what that conversation was?

Mr. Albaugh: I object to this, I did not go into the conversation.

The Court: I will sustain the objection. [126]

Q. Do you recall the last time you saw Mr. Ruud prior to November 4, 1946?

Mr. Albaugh: I make the same objection, this is not proper cross.

The Court: Overruled.

A. I can't say the exact date. I saw him about every week I was attending sales at Idaho Falls.

Q. About every week in October 1946?

A. Yes sir.

Q. Under date of October 31, 1946 as reflected by exhibit 13, you mailed to Mr. Ruud copies of a proposed contract that had been the subject of your negotiations? A. Yes sir.

(Testimony of Louis Salerno.)

The Court: Were they copies of executed contracts?

Q. Were they signed at the time you mailed them?

A. One was signed by Mr. Fallentine; the other was not signed then.

Q. Mr. Fallentine had signed one of the copies you sent under date of October 31st?

A. Yes sir.

Q. Sometime after November 4, you received a copy signed by Mr. Ruud? A. Yes sir.

Q. He mailed that one back? [127]

A. Yes sir.

Q. That was accompanied by the letter of November 3, 1946? A. Yes sir.

The Court: This copy you mailed to Mr. Ruud had been signed on behalf of your company, is that right?

A. Yes sir, one retained by him was signed.

Q. The Court: You send him two copies, one signed and one not signed? A. Yes sir.

Q. After November 4, 1946, did you see Mr. Ruud at various intervals?

A. Not until the fall of 1947.

Q. After November 4 in 1946 did you see Mr. Ruud?

A. I didn't see him but I talked to him over the phone.

Q. You saw him during the month of August, 1947? A. Yes sir.

Q. Where did you see him about the first of August, 1947? A. Grey's River.

(Testimony of Louis Salerno.)

Q. Where is that?

A. Wyoming, just across the state line.

Q. Where is that from Mr. Rudd's ranch?

A. I don't know the direction.

Q. In the vicinity is it? A. Yes sir.

Q. Had you gone there to see Mr. Ruud? [128]

A. Yes sir.

Q. Did you have a conversation at that time?

A. Yes sir.

Q. When was that?

A. Around the 9th or 10th of August.

Q. Was anyone present other than you and Mr. Ruud?

A. My wife was in the car, I don't think she heard the conversation.

Q. So far as the conversation was concerned just you and Mr. Ruud was present? A. Yes sir.

Q. State to the Court what that conversation was.

Mr. Albaugh: Objected to as not proper cross-examination. I didn't examine the witness as to that conversation of August 9th or 10th.

The Court: Overruled.

A. I attended the sale at Idaho Falls, and there was nine head of—

Q. —the question was as to the conversation.

A. I went up to make a demand for the cattle covered by the contract.

Q. Did you make demand? A. Yes sir.

Q. What did Mr. Ruud say?

A. He said he didn't have any cattle under that contract. [129]

(Testimony of Louis Salerno.)

Q. Was that in substance the extent of that conversation? A. Yes sir.

Q. Did you see Mr. Ruud again in August?

A. Yes sir.

Q. When was that, approximately?

A. The latter part, I don't know just what date it was.

Q. Was it toward the end of August?

A. Yes sir.

Q. Where did you see him at that time?

A. At the ranch.

Q. Near Irwin, Idaho. A. Yes sir.

Q. Was this contract the subject of that conversation?

A. I went up to make demand for the cattle covered by the contract.

Q. You went back for that a second time?

A. Yes sir.

Q. What was said then, if anything?

A. That he wouldn't deliver the cattle under the contract; he said he didn't have any cattle covered by the contract.

Q. In any of the conversations you had with Mr. Ruud or any dealings with Mr. Ruud during August or September 1947 was any offer made by Mr. Ruud to deliver cattle other than embodied in the letters sent?

Mr. Albaugh: Objected to as improper cross-[130] examination, and incompetent, irrelevant and immaterial.

The Court: Overruled.

(Testimony of Louis Salerno.)

A. He offered to deliver what cattle he had on the ranch for more money if we cancelled the contract.

Mr. Albaugh: Move to strike the answer as not responsive.

The Court: It may stand.

Q. Was any offer made other than stated in your answer? A. No sir.

Q. Do you recall when that was made?

A. I think the first of September, the first part.

Q. Was that on the occasion of your visit to his ranch? A. Yes sir.

Mr. Olmstead: That is all.

Mr. Albaugh: That's all.

BERT RUUD

Called as a witness by the defendant, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Albaugh:

Q. You are the defendant in this action?

A. Yes sir.

Q. And you have heretofore testified in this case, and were sworn at that time?

A. Yes sir.

Q. What is your age? [131]

A. Fifty-eight.

Q. How long have you been engaged in the business of cattle raising Mr. Ruud?

A. Thirty years or more.

Q. And ranching? A. Yes sir, the same.

(Testimony of Bert Ruud.)

Q. How long have you lived in Irwin, in the eastern part of Bonneville County, Idaho?

A. Thirty years.

Q. How many acres of land do you have there?

A. Nearly a thousand.

Q. Dry farm or irrigated? A. Both.

Q. What do you use it for, principally?

A. Dry land to raise grain and the irrigated for pasture.

Q. What is the altitude there?

A. Around 6100 feet.

Q. You were on this same ranch in October, November and December, 1946? A. Yes sir.

Q. At that time did you have, in November, about November 4, did you have any cattle on that ranch? A. November 4th.

Q. Yes, 1946?

A. No, I had none except just milk cows. [132]

Q. Did you own three hundred head of cattle at that time? A. No sir.

Q. Did you own three hundred head of steers branded O on left hip?

Mr. Olmstead: We object to this as tending to vary the terms of a written contract.

The Court: This is obviously an attempt to vary the terms of this contract.

Mr. Albaugh: This is to show conditional delivery of the contract.

The Court: That again would vary the terms. Do you expect to show an impossibility of fulfillment of the contract?

(Testimony of Bert Ruud.)

Mr. Albaugh: No, but to show that it was delivered conditionally, to take effect upon the obtaining of the cattle.

The Court: I understood this conditional delivery to be predicated on the letter of November 3rd, having to do with the shrinkage.

Mr. Albaugh: Both, based on shrinkage and the conditional delivery to take effect when he could obtain the cattle.

The Court: It is difficult to imagine in this case an attempt to vary this by parole evidence.

Mr. Albaugh: The parole evidence is not [133] varying the terms of the contract if the Court please. It is to show that it was to take effect upon the happening of certain conditions.

The Court: Let me call your attention to the provisions that the 300 head owned by and held on the seller's ranch were to be delivered—

Mr. Albaugh: —That was erroneous.

The Court: You have not asked for a rescission of the contract. The objection is sustained.

Q. Who had this contract prepared?

A. Mr. Salerno.

Q. That is the contract, exhibit 1 here.

A. Yes sir.

Q. Were you present when it was prepared, Mr. Ruud?

A. No sir.

Q. Did you submit any memorandum in writing, or any notes of any kind, directing Mr. Salerno how to prepare this contract?

(Testimony of Bert Ruud.)

Judge Baum: Objected to as incompetent, irrelevant and immaterial, the evidence shows he signed it as his contract.

The Court: I understand these negotiations are such as would be merged into the written contract. The objection is sustained.

Q. Did you have a conversation with Mr. Salerno prior to [134] the time you signed this contract in regard to the purchasing of steers to fill the contract?

Judge Baum: Objection if the Court please, upon the ground that it is incompetent, irrelevant and immaterial, all prior negotiations having been merged into the subsequently written contract.

The Court: I think the objections will be sustained.

Mr. Albaugh: In order to shorten the time required here. It is impossible as we view it, to enforce a contract where the subject matter is not in existence. It was not in existence here and never was. That fact, we think we are entitled to show. This is not an action for fraud and deceit against the defendant for selling something he didn't own. It is impossible for there to be a contract if the subject matter is not in existence. We would like to show that the subject matter never was in existence and that the contract was conditionally delivered.

The Court: A man cannot contract to deliver cattle in the future, you mean.

Mr. Albaugh: If they are identified, yes, if the delivery of the contract is not conditional upon him obtaining the cattle. [135]

(Testimony of Bert Ruud.)

The Court: Is it your thought that this contract was or is so uncertain as to be void?

Mr. Albaugh: Unless the subject matter can be identified.

The Court: I am talking about the contract itself as it stands. You think it is such a contract that the intent of the parties cannot be gathered from the instrument itself?

Mr. Albaugh: No sir, it cannot be.

The Court: And as it is, it tends to render negatory the entire contract.

Mr. Albaugh: The delivery of this contract was conditional. We think we should be permitted to show these facts.

The Court: You may proceed.

Q. Mr. Ruud did you ever obtain the cattle which you intended to make the subject matter of this contract?

Judge Baum: Objected to as incompetent, irrelevant and immaterial, tending to vary the terms of a written instrument.

The Court: It is immaterial. On that ground I will sustain the objection. You may have pleaded in one paragraph impossibility of fulfillment.

Mr. Albaugh: This goes to the understanding that the contract was to take effect when he got these [136] cattle.

Q. At the time you signed this contract I believe you had some cattle in Wyoming, some steers?

A. Yes I had all kinds of cattle in Wyoming, steers, cows and heifers, different kinds.

(Testimony of Bert Ruud.)

Q. Was there a variation in ages of these cattle?

A. Yes.

Q. What was that?

A. All the way from yearlings to four or five year olds.

The Court: Confine this to steers.

Q. Did this 218 head of steers vary in age?

A. Yes sir.

Q. What was or what would be that variation?

A. All the way from yearlings to long twos.

Q. Were these cattle you had in Wyoming the subject matter of this contract, exhibit 1?

Judge Baum: Objected to as incompetent, irrelevant and immaterial.

The Court: There was evidence introduced that these steers, or tending to show that these steers were subject to delivery the following year. I think the objection will be overruled. A. No sir.

Q. Where were the cattle which was the subject matter of this contract, or intended to be the subject matter? [137]

Judge Baum: Objected to as incompetent, irrelevant and immaterial, the contract speaks for itself in that regard.

The Court: Overruled.

A. Can I explain my answer—the way the contract was drawn up—

Q. Answer the question.

A. The way the contract was drawn I was to purchase the cattle for Mr. Salerno, and to have them dehorned to his satisfaction which the con-

(Testimony of Bert Ruud.)

tract recites, and then we were to brand them with a circle for identification. As to where they were to be, that was where I could purchase them either in Montana, Wyoming or Idaho.

Judge Baum: I move to strike all the answer except the last phrase which was in response to the question.

The Court: It may be stricken except the last portion of the answer.

Q. Now these cattle that you had in Wyoming, had they been dehorned? A. Yes sir.

Q. This contract provides that you should dehorn these at your expense at the proper dehorning time. The cattle covered by the contract; what does that indicate to you as a cattle man, about the age of the cattle?

Judge Baum: We object to that as incompetent.

The Court: He may answer.

A. The contract says—

Q. —What does that indicate to you as a cattle man?

A. Small cattle that they wanted me to purchase.

Q. What do you mean by small cattle?

A. Yearlings.

Q. Long yearlings or short yearlings?

A. Could be either, mostly short yearlings, I would say.

Q. Did you have any short yearlings in your Wyoming bunch? A. No sir.

(Testimony of Bert Ruud.)

Q. You heard the testimony of Mr. Robertson about this paint that you put on them. This paint brand?

A. Yes sir.

Q. Tell us how you branded these cattle with the paint brand?

A. When I bought these cattle I had to leave them in the vicinity there for some time, and that demanded that I put some kind of mark on them until I assembled them in the feed lot, and I had to trail them through other cattle and so I had a man at the gate and as I brought them out he would dob them with a beer bottle or a stick.

Q. Where were they branded?

A. On the hip mostly.

Q. With a beer bottle or stick?

A. Well, we used a bottle mostly but we broke the bottle a couple of times. [139]

Q. I understand this was green paint?

A. Green mostly, that is the only kind I had.

Q. How long would that paint remain on the cattle?

Judge Baum: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. It stays on quite well, the paint would stay two or three months if there wasn't too much storm. It would wash off with the weather.

Q. Was that the brand you referred to when you wrote O left hip in your contract?

Judge Baum: Objected to as incompetent, irrelevant and immaterial, and an attempt to vary the terms of a written instrument.

(Testimony of Bert Ruud.)

The Court: Overruled.

Q. Why did you put in this O brand on left hip, in the contract?

A. It was agreed with Mr. Salerno that we had to have some identification. I put the brand so he could identify them by that brand after they had been dehorned.

Q. Now, were any of the Wyoming steers horned?

A. Very few, now and again one had been overlooked there was two or three large steers with horns on them.

Q. Now, Mr. Ruud, why didn't you get the cattle which you intended to make the subject matter of this contract?

Judge Baum: Objected to as incompetent, [140] irrelevant and immaterial.

The Court: Sustained unless you are going to show an impossibility of fulfilling this contract.

Mr. Ruud, at the time this contract was delivered to you for your signature, November 4, were you paid the sum of \$3,000.00 mentioned in the contract? A. No sir.

Q. Did you receive any money from the plaintiff later on? A. Yes sir.

Q. How was that money paid to you?

A. It was left by check by Mr. Salerno at the hotel for me to pick up.

Q. What was that paid on, was it on this contract?

(Testimony of Bert Ruud.)

Judge Baum: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. The check recited that it was for cattle that I was—

Judge Baum: I think that can be answered yes, or no, read the question to the witness Mr. Reporter.

(Question read.)

A. No sir.

Q. Does that check represent or evidence payment you received from the plaintiff in 1946?

A. Yes sir.

Q. What is the date of that? [141]

A. November 29, 1946.

Q. About when did you receive that check?

A. I think about the 7th or 8th of December.

Q. Did you make any alterations in the check after you received it?

Judge Baum: I think I object at this time upon the ground that this line of questioning now appears irrelevant and immaterial. The witness stated that the check he is holding was not paid under this contract, if it wasn't paid under the contract then I fail to see the materiality at all.

The Court: Overruled.

A. No sir.

Q. Is that the only money you received in the Fall of 1946 or the year 1947 from the plaintiff corporation? A. Yes sir.

Mr. Albaugh: We now offer in evidence exhibit 16.

(Testimony of Bert Ruud.)

Judge Baum: Objected upon the sole ground that the witness has indicated that it wasn't a payment under this contract. No, I will **withdraw my objection** and the exhibit may be received without objection for what it is worth.

The Court: It is admitted.

Q. Did you ever receive any consideration, either money or otherwise for the execution of this contract? [142]

Judge Baum: Objected to as incompetent, irrelevant and immaterial, also seeking to vary the terms of the written contract.

Mr. Albaugh: One can always show consideration.

The Court: He may answer.

A. No sir.

Q. Now, Mr. Ruud, I believe you stated that you received this check about the 7th or 8th of December and this contract was signed November 4. What happened during the month of November concerning this contract?

A. I was trying to buy steers to fill it.

Q. Did you get those steers?

Judge Baum: Objected to as immaterial, irrelevant and incompetent.

The Court: What steers do you refer to counsel?

Mr. Albaugh: To fill the contract in question here.

The Court: Objection sustained.

Q. What was this check exhibit 16 given to you for?

(Testimony of Bert Ruud.)

Judge Baum: Objected to as incompetent, irrelevant and immaterial.

The Court: It isn't clear to the Court what it was given for, he may answer.

A. I agreed to accept it and try to purchase cattle because [143] we had not filled the three hundred head as agreed in the contract, it was agreed that it would be between two and three hundred head.

Mr. Olmstead: I would rather have the conversation if there was one, and I move to strike this answer.

The Court: It may be stricken.

Q. Did you have any conversation with any representative of the plaintiff corporation during the month of November 1946 concerning the purchase of cattle? A. Yes sir.

Q. With whom was that?

A. Mr. Salerno.

Q. Where did your first conversation take place after November the 4th?

Mr. Olmstead: We object unless it relates to the cattle involved in this contract.

The Court: Unless it was another contract that was to be substituted for this one.

Mr. Olmstead: If they agree that the contract was modified but I don't think they do.

Mr. Albaugh: We contend that both parties abandoned this contract.

The Court: You seem to plead a new contract, a parole contract. **Overruled. [144]**

(Testimony of Bert Ruud.)

Q. Where was the conversation?

A. At Idaho Falls.

Q. Where in Idaho Falls?

A. At the Bonneville—no, at the Rogers Hotel.

Q. Who was present?

A. Mr. Salerno and myself.

Q. Relate what was said?

A. It was getting late in the Fall, feeder steers had quit running—

Q. —When did this conversation take place, what day of the month was it?

A. Around the last week in November. We had a conversation in regard to the purchase of the cattle. It was getting late in the Fall and I had fell down on getting two or three bunches. He knew that I agreed to accept this check and try to purchase cattle, it was agreed—

Mr. Albaugh: I will try to get the conversation.

Q. Mr. Ruud, just tell us what was said.

The Court: What was said by Mr. Salerno and yourself, Mr. Ruud. You were at Idaho Falls the last week in November, now go on from there.

A. I had not purchased the steers referred to in the contract. We had not received them and couldn't brand them. We talked the matter over. The run for feeders was getting slack, they only run in the months of October or November. Toward the latter end of November they are hard to get. [145] I agreed to take this check.

The Court: Tell us what was said, not what you agreed to do.

(Testimony of Bert Ruud.)

A. Mr. Salerno said "I will make you out a check" and I said "I will be able to get two or three hundred steers" and he said "shall I make it for two thousand or three thousand", I said "You can suit yourself, we might get two or three hundred" and he said "I will leave the check for you". I didn't see it until I picked it up and it said on the check 240 or more. When I talked to him again he said, "Did you get the check" and I said "I got the check" and I told him when I got the cattle he could come in and dehorn them and we would brand them, the same as on the old contract. That is the reason the check was altered in that manner.

Q. You deposited the draft did you?

A. Yes sir.

Q. And sent it through?

A. Yes, it laid in the bank and never was used, there was no purchase under that.

Q. Was it difficult that later, December 4, 5 or 6th, to obtain feeder cattle?

Judge Baum: We object, that is immaterial whether it was difficult or not.

The Court: Sustained. [146]

Q. In that section of the country, including Eastern Montana and Western Wyoming, are cattle bought for feeding?

A. During the months of September, October and November, yes.

Q. Before you received this draft which is exhibit 16, had the plaintiff corporation offered you any check before that time?

A. No sir.

(Testimony of Bert Ruud.)

Q. In your letter which is exhibit 2, accompanying the contract when you mailed it back to the plaintiff corporation on November 3rd or 4th, you demanded a change in the contract to eliminate the three per cent shrink. What was done in regard to that matter; did the company ever agree to waive the three per cent shrink? A. No sir.

Q. Did you ever agree to waive that demand?

A. No sir.

Q. When you took this draft for 240 or more head of steers was there anything said at that time in that conversation with Mr. Salerno about the price they were to pay for these cattle, or anything about the three per cent shrink?

A. The original deal was 17½ cents live weight and they broke it down on a dead weight deal that I didn't understand, and when I accepted this check it was agreed that the contract would be 17½ cents delivered at Ogden and no other way.

Q. Live weight?

A. Yes sir, that was the deal as it started out; they drew the contract the other way.

Q. Did you ever sell cattle before on a dressed weight basis? A. No sir.

Judge Baum: Objected to as immaterial.

The Court: Sustained.

Q. Did you discuss this three per cent shrink at that time. The conversation with Mr. Salerno at the time he said he would leave a check for you?

(Testimony of Bert Ruud.)

A. The only thing that was mentioned was 17½ cents. He said, "I always buy your cattle and I always pay for them and I will see that you get 17½."

Q. How long after that was it he left the draft?

A. I picked it up about a week after that.

Q. Where did you get it?

A. At my hotel box.

Q. Where? A. At the Rogers Hotel.

Q. At Idaho Falls? A. Yes sir.

Q. After that time did you buy any cattle for the plaintiff corporation or not—under any contract?

A. No sir.

Q. Why didn't you? [148]

Judge Baum: Objected to as immaterial.

The Court: It is immaterial. Objection sustained.

Q. Now, did Mr. Salerno come to your ranch in August 1947? A. Yes sir.

Q. Did you have a conversation with him there?

A. Yes sir.

The Court: When was this?

A. August 1947.

Q. When did you have the first conversation with Mr. Salerno in August 1947?

A. I cannot state the exact date but I remember him meeting me on the road at Grey's River.

Q. Who was present?

A. His wife was in the car I was getting some gas for my car at the service station and he walked over there, just him and me.

(Testimony of Bert Ruud.)

Q. What was said?

A. He said he saw some steers from my ranch at Idaho Falls.

Q. Pardon me, what did you say?

A. He said he saw some steers at Idaho Falls, from my ranch he said he saw them in the sale there and he said, "I am going to hold those steers" I said "How are you going to hold them, have you any identification to hold them" he said "yes I have," and at that he drove away. I didn't [149] see him for two or three days, maybe a week. I was notified by the stockyard that the payment was held up and I went to the brand inspector to find out why and he said there was no bill of sale to cover them and he said the Ogden Packing Company were holding the cattle.

Judge Baum: That is objected to as hearsay.

The Court: Wasn't this gone into in your case? I think it was and I think defendant is entitled to go into this. By the brand inspector I presume he means this gentleman back here.

Judge Baum: I assume so.

Q. When did you see Mr. Salerno again?

A. He came to the ranch again, I think the fore part of September, it may have still been in August.

Q. Would you say it was about the first of September?

A. Yes sir, the first of September or the last of August.

Q. Did you have a conversation with him at that time?

A. Yes sir.

(Testimony of Bert Ruud.)

Q. Who was present?

A. His wife was with him again. He drove in in his car.

Q. Where did the conversation take place?

A. On my field there.

Q. Relate that conversation as fully as you can, what was said by each of you?

A. He walked over to where I was irrigating and I invited [150] him to drive into the yard and we would talk the matter over that he came to see me about. He drove in front of my house and I took off the boots that I had on and we started to talk about the contract and the cattle.

Q. What was said?

A. He wanted to make some kind of demand on delivery and I said, "Is there any way we can take these cattle on the contract," and he said, "I don't want to take these cattle, I don't want to look at them."

Q. Now, what cattle are you talking about?

A. That I had on the ranch. I was trying to accommodate them and let them have the cattle at the same price.

Q. Will you just state what was said Mr. Ruud, not what you were trying to do.

A. There was an argument.

Q. What about?

A. The quality of the steers. These cattle were a heavy cattle and the cattle we agreed on the contract was to be light cattle.

Q. Did you discuss that?

A. Yes sir.

(Testimony of Bert Ruud.)

Q. What was said about the heavy and light cattle?

A. I try to give the conversation but it is hard to do. I tried at that time to get him on a horse and go to look at the cattle and talk about them and he refused to go. [151]

Q. Did he ever go and look at them?

A. No sir.

Q. Now, what was said and done there, just go ahead with the conversation?

A. He said according to that contract I have got to deliver three hundred head of steers branded with O on the left hip and I argued that the contract didn't say so and he said, "Well I am making demand for three hundred cattle," and I said, "I will get the contract and we will read it." I said, "What kind of cattle does that say?", and he said "steers" and I said, "I will go to Denver and buy you three hundred steers and sell them to you for 17 $\frac{1}{4}$ cents," and he said, "What kind of steers," and I said, "Steers as called for in the contract and will sell them for 17 $\frac{1}{2}$."

The Court: What contract was that?

A. The contract we had there. I thought that it was cancelled but he insisted on this. He said, "I don't think we can use that many steers, what kind will they be?", and I said, "They will be steers," he said, "I don't think we can use that many steers," and that was the substance of the conversation.

Q. Did he ask you to deliver those cattle on the ranch?

A. No sir.

(Testimony of Bert Ruud.)

Q. Did he say anything about them?

A. Never. [152]

Q. You asked him to go and look at them, what was his reply to that?

A. He said he didn't want to see them.

Q. Did he say why?

A. No sir. When he came to see me the first time my wife offered to show him the cattle and he refused to see them.

The Court: Were you there?

A. No, he was waiting to see me and my wife thought perhaps he wanted to see the cattle.

The Court: Never mind that part of it, what your wife did.

Q. In this conversation was there some arrangement for you to go to Afton, Wyoming and for him to call you later? A. That was after.

Q. When did that conversation take place?

Q. He came back after I had written a letter.

Q. What was that conversation where you agreed to meet him in Afton, or to talk to him?

A. Two or three weeks later, about the last week in September.

Q. What was said at that time?

A. We talked along the same lines, I tried to make some sort of a deal with the cattle we had on the ranch.

Q. Why?

A. As an accommodation, to try to settle this thing so that everybody would be friendly. [153]

(Testimony of Bert Ruud.)

Q. Did Mr. Salerno contend at that time that these cattle were cattle that you should deliver under the contract? A. No sir, he did not.

Judge Baum: I object to that as leading.

The Court: Reframe your question.

Q. Did Mr. Salerno at any time or anywhere in the Summer or Fall of 1947 ever demand that you deliver the cattle that you had on your ranch to the plaintiff corporation? A. No sir.

Q. Did he ever go and look at them?

A. No sir.

Q. At any time? A. No sir.

Q. How many times did you offer to show them to him?

A. I think three times, perhaps four.

Q. Did he state why?

A. One time he said on account of the weight.

Q. Did he say they were too light or too heavy?

A. Too heavy.

Q. When did he make that statement?

Judge Baum: I think that has been covered.

The Court: Overruled.

A. On the first visit.

Q. Tell us where this other conversation took place in which you agreed to go to Afton to telephone the plaintiff? A. On my ranch. [154]

Q. Who was present?

A. Louie and myself.

Q. Fix the date?

A. Along the last part of September.

Q. State what was said at that time?

A. I told him I had written to the house and

(Testimony of Bert Ruud.)

in answer to my letter they demanded 300 cattle or else. I wrote them I would buy three hundred head and I am repeating to you that I will buy three hundred head and he said, "I will go back to Ogden and then call you," and I said, "What time?", and he said, "At 10 o'clock Monday," and I said, "I will be there." I went to Afton the following Monday and about 11:30 I got a call and he said, "We decided that we can't use those cattle." I said, "Can you use these others?", and he said, "No." I said, "I have tried to satisfy you," and I said, "I am going to sell these cattle," and I did so and that was the last of the deal until they filed this suit and I talked to you about the matter and employed you at that time.

Q. Now, did you return to the plaintiff corporation \$3135.00 in the month of September 1947?

A. I think you did that.

Q. To refresh your recollection, it was your check was it not?

A. Yes, I took it to you and you figured the interest and you mailed it with your letter. [155]

Q. It was your check?

A. Yes sir, I still have the check.

Q. They returned the check? A. Yes sir.

The Court: We will take a ten minute recess.

11:35 a.m., May 26, 1948

Q. Are you acquainted with **Mr. Robertson** who testified here yesterday? A. Yes sir.

Q. Did he work for you in Jackson Hole for a while in the Fall of 1946? A. Yes sir.

(Testimony of Bert Ruud.)

Q. Do you remember when you employed him?

A. Yes, I think it was the first week of November. I think I employed him in October and I think he had to leave and then he came back either the last of October or the first of November.

Q. Did you at any time ever make a statement to Mr. Robertson that these cattle you had in Jackson were under contract? A. No sir.

Q. Were they under contract? A. No sir.

Q. Did you discharge Mr. Robertson?

A. Yes sir.

Q. Do you ordinarily tell your hired hands about your business affairs? [156]

Judge Baum: Objected to as immaterial.

The Court: Sustained. The only important matter here is whether he told him at that time.

Mr. Albaugh: At this time, if the Court please, we desire to make **an offer of proof**. We offer to prove by this witness that at the time this contract was entered into or signed. At the time it was negotiated with Mr. Salerno, immediately prior to the signing of the contract that the defendant did not have three hundred head of steers or any number whatever, on his ranch, and did not own any steers which were the subject matter of this contract; that it was understood and agreed between the plaintiff corporation by and through their agent Mr. Salerno that the contract would not take effect until Mr. Ruud had purchased the steers which would be the subject matter of the contract

and that the contract was delivered conditionally upon his obtaining such steers to be the subject matter of the contract, that the steers were never obtained and the subject matter of the contract was never in existence and that the contract was never delivered and never became effective.

The Court: What do you mean by that statement, "never was delivered"?

Mr. Albaugh: No legal delivery, I am distinguishing between manual and legal delivery.

Mr. Olmstead: That is objected to for the reason that the proffered evidence is immaterial, incompetent and irrelevant and it seeks to vary the terms of a written agreement.

The Court: The offer of proof is denied.

Mr. Albaugh: That is all.

Mr. Olmstead: I think there is no cross-examination.

Mr. Albaugh: The defense rests.

Mr. Olmstead: No, I think not, however, we may have one short witness.

The Court: We will recess until 1:30.

1:30 p. m. May 26, 1948

Mr. Olmstead: The plaintiff rests.

The Court: There is one exhibit I excluded on yesterday.

Mr. Albaugh: Exhibit 15 I think is the only one excluded.

The Court: I think I will reverse my ruling and admit it for what it may be worth.

DEFENDANT'S EXHIBIT No. 15

Ogden, Ut., Nov. 15, 1946.

Bert Ruud,

Irwin, Ida.

Dear Sir.

I have your letter of Nov 3 and I am sorry you did not understand the 3% shrink as we shrink all of our kill and I thought you would understand this.

If you will check with other Packers I am sure you will find that they figure their cattle the same way.

As to the 29.66 for a 59 yield. If they yield more you will get paid for all over 59% as we will deduct for all under 59%.

The 3% shrink on hot weights will have to remain in the contract or I can not buy these cattle.

If you want to go through with this contract please write me and we will mail you a check.

Yours Truly

/s/ LOUIS SALERNO.

(Statement of Court and counsel as to filing of briefs.)

The above is all the evidence and proceedings had in and about the trial of the above cause. [158]

State of Idaho,

County of Ada—ss.

I. G. C. Vaughan, hereby certify that I am the duly appointed Official Court Reporter for the United States District Court, in and for the District of Idaho; I further certify that I took the evidence and proceedings in the above entitled cause in shorthand and thereafter transcribed the same

(Testimony of Bert Ruud.)

into longhand (typewriting) and that the foregoing pages 4 to 146 is a true and correct transcript of the proceedings had and the evidence given in the trial of the above entitled cause.

In witness whereof I have hereunto set my hand this 5th day of July, 1948.

/s/ G. C. VAUGHAN,

Reporter.

[Endorsed]: Filed Nov. 12, 1948. [159]

[Title of District Court and Cause.]

MEMORANDUM OPINION

Healy, District Judge

I am of opinion that the written contract was a binding agreement, unconditionally delivered, or if its delivery was conditional that the condition was waived. The defendant breached it in its entirety and plaintiff is entitled to damages measured by the difference between the contract price and the market price at Ogden as of the time the property should have been delivered. There was no mutual abandonment of the contract; but as will presently be seen I am of the belief that there was a subsequent parol modification or partial rescission of it designed to relieve the defendant of his obligation to deliver the full number of steers contracted for.

I do not regard defendant's letter of November 3, 1946, as sufficiently evidencing a conditional delivery of the contract. I think it was intended as

no more than an expression of a desire for the elimination of the provision relative to the 3% shrink. Defendant's conduct in signing and returning the offered contract, plus his request that plaintiff also sign it and mail him a check, is powerful evidence of an unconditional delivery. In any event, the later acceptance of the \$3,000 payment, which was undoubtedly made and received as a payment on the written contract, would establish a waiver of the condition. Beyond that, the defendant subsequently regarded the contract as being in effect, as is shown in his letters of August 22nd and 28th, 1947.

Defendant did not offer to perform the contract, as he claims. In this and in all other phases I place no credence whatever in his testimony. Only in particulars in [160] which it is fully corroborated by other evidence do I regard it as worthy of belief. Defendant reneged on his engagement for the obvious reason that it was to his advantage to do so. The plaintiff fully performed the obligations on its part.

There can be no question but that the 218 head of steers shown to be on feed in Wyoming in November, 1946, were the steers referred to in defendant's letter of November 3. These animals then bore the "O" brand on the left hip. They constituted, pro tanto, the steers with which defendant expected to fulfill his contract. Whether defendant had any additional steers is not shown, but he probably had not. The cost of acquiring them advanced steadily after that time, as he says. This

brings us to a consideration of Defendant's Exhibit 16, being the draft for \$3,000 dated November 29, 1946, and cashed by the defendant ten days later. The reference in the attached so-called bill of sale to "240 or more" head of steers creates an ambiguity in the proof that I have found it difficult to resolve. The witness Salerno could have clarified this ambiguous document if he had been asked about it, but no inquiry on the subject was made of him. Defendant was plainly not happy about the 3% shrink, and he was doubtless currently complaining to Salerno of the difficulty of getting steers at prices he had expected to pay. This latter I gather from his testimony. Salerno, while claiming that he had not seen the defendant during this period, admitted that he had talked with him on the telephone.

Reading between the lines, and endeavoring to give due weight to this important exhibit, I am of the belief that Salerno agreed orally to relieve the defendant of his obligation to deliver the full number of steers contracted for and undertook on behalf of his principal to reduce the number to not less than 240 head. See Restatement of the Law of Contracts, Par. 408. In view of its failure to interrogate [161] Salerno, I am inclined to resolve against the plaintiff doubts concerning Salerno's authority, concerning plaintiff's ratification of his act, and also questions relative to consideration for the modification, or the effect, if any, of defendant's subsequent failure to perform. My conclusion is that as regards the number of steers required to

be delivered under the terms of the written contract the defendant was absolved of his obligation to the extent indicated in the exhibit. There is no credible evidence of a rescission or modification of any other term of the written agreement.

Plaintiff should be required only to prove its damages with such degree of certainty as the circumstances permit. The business in which plaintiff was engaged and the purpose for which it wanted the steers were well known to the defendant who was himself an experienced dealer in beef cattle. Both parties were familiar with the usages of the trade. The contract, as construed by the defendant himself, contemplated steers of good quality. The quality of those defendant had on feed at the time is strongly corroborative of this interpretation. It is to be gathered from the contract that the steers, when delivered, were to be suitable for present slaughter, that is, they were not to be what is commonly referred to as feeder steers.

The chief difficulty on this phase is as to the weight. It is true that the 218 head above referred to were shown on their sale the following August to weigh well over 1,000 pounds. However, title to them had not passed, they were not legally dedicated to the contract, and the defendant was free to substitute other steers of good quality. I think on all the evidence a fair, perhaps minimum, finding as to average weight would be 950 pounds. The contract price, live weight, was 17½ cents per pound. There is competent [162] evidence that the going market price at Ogden for good quality

steers suitable for slaughter at the time specified for delivery, was not less than 25 cents. Using the difference between these two figures and assuming a weight of 950 pounds, the damage per steer would be \$71.25, and for 240 steers would be \$17,100. Plaintiff is entitled to judgment for this amount plus the sum of \$3,000 advanced on the contract price. Presumably it is entitled to interest on the latter sum from the date of payment of *payment*. Judgment will be given accordingly.

Counsel for the plaintiff should prepare and submit findings of fact and conclusions of law. Opportunity will be given opposing counsel to make objections to these findings or to propose others.

[Endorsed]: Filed Oct. 4, 1948. [163]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on regularly for trial on the 25th and 26th days of May, 1948, before the above Court sitting without a jury, the Honorable William Healy, United States Circuit Judge for the Ninth Circuit, presiding, upon the complaint of the plaintiff and the amended answer of the defendant, the plaintiff being present in Court and represented by its counsel, and the defendant being present in Court and represented by his counsel, and evidence, both oral and documentary, having been offered by the respective parties, and both parties having rested their respective cases, and the matter having

been submitted to the Court for decision, and the Court being fully advised in the premises, now makes the following

FINDINGS OF FACT

I.

That the plaintiff is, and has been for many years past, a citizen of the State of Utah, being a corporation duly organized and existing thereunder, with its principal place of business at Ogden, Utah, and is, and has been for many years, qualified to do and doing business in the State of Idaho; that the defendant is a citizen and resident of Bonneville County, Idaho. That the matter is controversy between the parties exceeds, exclusive of interest and costs, the sum of Three Thousand (\$3,000.00) Dollars.

II.

That plaintiff is, and has been for many years, engaged in carrying on a general livestock slaughtering and [164] meat packing business, with its principal slaughtering and processing plant at Ogden, Utah. That the defendant is, and has been for many years, engaged in carrying on a general ranching business near Irwin, Bonneville County, Idaho, and engaged in raising, feeding, buying and selling livestock for commercial purposes.

III.

That on the 4th day of November, 1946, plaintiff and defendant made and entered into and delivered a contract in writing as follows:

“This Agreement, made this 4 day of November, 1946, by and between Bert Ruud of Irwin, Idaho,

hereinafter called the Sellar, and American Packing & Provision Co. of Ogden, Utah, hereinafter called the Buyer,

Witnesseth:

Whereas, the Sellar is the owner of certain steers now held upon Seller's ranch near Irwin, Idaho, which said steers are branded O L Hip; and,

Whereas, the Buyer desires to purchase three hundred (300) head of said steers upon terms and conditions mutually agreed upon, which terms and conditions are hereinafter set out;

Now, Therefore, it is hereby mutually agreed between the parties hereto as follows:

(1) The Sellar hereby agrees to sell and deliver to the Buyer, and the Buyer hereby agrees to purchase from the Sellar three hundred (300) head of the steers hereinbefore described.

(2) The Buyer herewith pays to the Sellar, receipt of which by the Sellar is hereby acknowledged the sum of Three Thousand (\$3,000.00) Dollars, as partial payment upon the purchase price of said steers, the full amount of which purchase price is to be determined at the times and in the manner set out in Paragraph 4 hereof.

(3) The Sellar agrees at his sole expense to continue to care for and feed said steers in accordance with good ranching practice on his ranch near Irwin, Idaho, until called for by the Buyer as hereinafter provided, and to dehorn the same at his own expense at the proper dehorning time, and to deliver the same to the Buyer as hereinafter provided, free and clear of all liens and encumbrances

of every kind and character. Sellar's operations in connection with his caring for, feeding, and for de-horning said cattle shall [165] be subject to Buyer's inspection at any and all times, but Buyer assumes no responsibility in connection therewith.

(4) As and when called for by the Buyer, which shall be during the period from August 1, 1947, to October 1, 1947, the Sellar agrees at his sole expense to deliver said three hundred (300) steers, and all of them, to the Buyer, F.O.B. Ogden, Utah. When delivered to the Buyer as aforesaid, the off car live weight of the same shall be determined, and thereafter the same shall be slaughtered by the Buyer as soon as is reasonably possible in the orderly conduct of Buyer's business (the Buyer to be the sole judge thereof). Following the slaughter of the same they shall be graded in accordance with U. S. Department of Agriculture standards, and the dressed weight yield thereof, using approved packing house methods in determining the same, and by shrinking the warm weight three (3%) per cent, shall be ascertained, and the Buyer shall pay the Sellar therefor at a price based on the dressed weight in accordance with which ever of the following formulas may be applicable:

A. For Those That Grade "A":

For all of said steers that grade "A" in accordance with the foregoing standards, the Buyer shall pay to the Sellar as the full purchase price therefor, upon the basis of the total dressed weight thereof at the rate of 29.66 cents per pound dressed weight.

B. For Those That Grade in Excess of Grade "A":

For all of said steers that grade in excess of Grade "A" in accordance with the foregoing standards, the Buyer shall pay to the Seller, as the full purchase price therefor, upon the basis of 29.66 cents per pound dressed weight, plus the then difference in Buyer's market price per pound dressed weight between grade "A" steers and the Grade of such steers. For example: If at the time of slaughter, the Buyer's then market price for grade "AA" steers is two (2) cents a pound dressed weight higher than for grade "A" steers, the Buyer shall pay the Seller for the "AA" steers 29.66 cents, plus 2 cents, or a total of 31.66 cents per pound, dressed weight.

C. For Those That Grade Less Than Grade "A":

For all of said steers that grade less than Grade "A" in accordance with the foregoing standards, the Buyer shall pay the Seller, as the purchase price therefor, upon the basis of 29.66 cents per pound dressed weight, less the then difference in Buyer's market price per pound dressed weight between grade "A" steers, and the grade of such steers. For example: If at the time of slaughter the Buyer's then market price for grade "B" steers is two (2) cents a pound dressed weight less than for grade "A" steers, the Buyer shall pay the Seller for grade "B" steers 29.66 cents, less two cents (2), or a total of 27.66 cents per pound, dressed weight. [166]

(5) It is understood that the Seller at this time has steers of the same type as those preferred to

herein in excess of the 300 hereby sold to the Buyer, and the Sellar hereby guarantees delivery to the Buyer of the full count of 300 head, without any reservation, express or implied.

(6) Title to the aforesaid steers is to remain in the Sellar until delivered to the Buyer as herein provided, and until so delivered they are held by the sellor at his sole and exclusive risk and expense.

In Witness Whereof, the parties have hereunto set their hands this 4th day of November, 1946.

/s/ BERT RUUD,

Sellor.

AMERICAN PACKING &
PROVISION CO.,

By /s/ E. W. FALLENTINE,

Its Vice-President.

Buyer.”

IV.

That thereafter and on or about November 29, 1946, the said contract was modified to the extent of changing the number of steers covered thereby from 300 steers to 240 or more steers.

V.

That the type of steers covered by said contract were steers of good quality and suitable for slaughter upon delivery.

VI.

That plaintiff duly performed all of the conditions, stipulations and agreements on its part to be performed.

VII.

That on or about August 26, 1947, and within the time so provided in said contract, plaintiff de-

manded of defendant delivery to it of the steers covered by the contract, such delivery to be made on or before September 3, 1947. [167]

VIII.

That defendant without legal cause failed and refused to deliver to the plaintiff the steers covered by the contract, or any of them, at the time he ought to have delivered them as provided by the contract, or at all.

IX.

That the average weight of the steers covered by the contract as of the time delivery should have been made was 950 pounds each.

X.

That the time plaintiff was entitled to delivery of the steers covered by the contract there was an available market at Ogden, Utah for such steers.

XI.

That the contract price of the steers covered by the contract was 17.5 cents per pound live weight.

XII.

That the market price of the steers covered by the contract at the **time defendant ought to have** delivered them to plaintiff at Ogden, Utah, was 25 cents per pound, live weight.

XIII.

That plaintiff paid to defendant on account of the purchase price of the steers covered by the contract the \$3,000.00 mentioned in paragraph 2 of this contract.

XIV

That except as modified as to the number of steers covered by the contract from 300 steers to 240 or more, the contract was at all times, from the date of the execution and delivery thereof by the parties, a valid and binding contract.

XV.

That said contract was not conditionally delivered, not did any conditions, either conditions precedent or conditions subsequent, attach to its delivery. [168]

XVI.

That there was no failure of consideration, either partial or total, insofar as the contract was concerned.

XVII.

That said contract was never rescinded or abandoned.

XVIII.

That except to modify the contract as to the number of steers covered thereby from 300 to 240 or more, no new or additional contract or agreement was made which affected in any way the obligations of the parties as set forth in such contract.

XIX.

That subsequent to the time defendant ought to have delivered to plaintiff the steers covered by the contract, defendant offered to return the \$3,000.00 previously paid by plaintiff under the contract, but plaintiff refused to accept the same.

XX.

That defendant never made an offer to fulfill his obligations under the contract.

XXI.

That the defendant asserts that the contract was conditionally delivered. The Court has hereinbefore found that the contract was not conditionally delivered, but the Court further finds that even if any conditions were attached by the defendant to the delivery of the contract, such conditions were waived by him.

XXII.

That the difference between the contract price of 17.5 cents per pound live weight for the steers covered by the contract and the market price of said steers at the time and place delivery ought to have been made of 25 cents per pound live weight, namely, 7.5 cents per pound live weight, was and is the basis of plaintiff's damages. [169]

XXIII.

That upon such basis, plaintiff's damages for each of the 240 steers of an average weight of 950 pounds which defendant should have delivered, but didn't deliver, was \$71.25 per steer, and a total of \$17,100.00 for the 240 steers.

And the Court having made the foregoing Findings of Fact now reaches the following

CONCLUSIONS OF LAW

1. That plaintiff is entitled to judgment against the defendant for \$17,100.00 damages for defendant's breach of the contract.

2. That plaintiff is entitled to judgment for \$3,000.00 paid by it as a part of the purchase price for the steers covered by the contract.

3. That plaintiff is entitled to judgment for interest on said sum of \$3,000.00 at the legal rate of 6% per annum from September 3, 1947.

4. That plaintiff is entitled to judgment for its costs.

Let Judgment Be Entered Accordingly.

Dated this 1st day of November, 1948.

WILLIAM HEALY,
Judge.

[Endorsed]: Filed Nov. 3, 1948. [170]

In the United States Court for the District
of Idaho, Eastern Division

No. 1464

AMERICAN PACKING & PROVISION CO., a
Corporation,

Plaintiff,

vs.

BERT RUUD,

Defendant.

JUDGMENT

Filed November 3, 1948

This matter came on regularly for trial on the 25th and 26th days of May, 1948, before the above Court, sitting without a jury, the Honorable William Healy, United States Circuit Judge for the Ninth Circuit, presiding, upon the complaint of the plaintiff and the amended answer of the defendant, the plaintiff being present in Court and represented by its counsel, and the defendant being present in Court and represented by his counsel, and evidence, both oral and documentary, having been offered by the respective parties, and both parties having rested their respective cases, and the matter having been submitted to the Court for decision, and the Court having heretofore made and entered its Findings of Fact and Conclusions of Law wherein the facts found and the conclusions reached are separately stated;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that plaintiff have and recover judg-

ment from the defendant for the sum of \$20,100.00, together with interest on \$3,000.00 thereof at the rate of six percent (6%) per annum from September 3, 1947, in the amount of \$212.50, making a total judgment of \$20,312.50.

It Is Further Ordered, Adjudged and Decreed that the plaintiff have and recover judgment against the defendant for its costs assessed in the amount of \$375.99.

Dated this 1st day of November, 1948.

WILLIAM HEALY.

United States Circuit Judge.

Entered in Civil docket Nov. 3, 1948.

[Endorsed]: Filed Nov. 3, 1948. [171]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT
COURT OF APPEALS

Notice is hereby given that Bert Ruud, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on November 3, 1948.

Dated November 5, 1948.

ALBAUGH, BLOEM,
HILLMAN & BARNARD,
Attorneys for Defendant-
Appellant,

[Endorsed]: Filed Nov. 12, 1948. [172]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Appellant designates the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action:

1. Complaint.
 2. Amended answer.
 3. The entire transcript of the evidence, copy of which is on file with the court.
 4. Findings of fact and conclusions of law.
 5. Judgment
 6. Notice of Appeal
 7. This designation.
- Dated November 19, 1948.

ALBAUGH, BLOEM,
HILLMAN & BARNARD,
Attorneys for Appellant.

[Endorsed]: Filed Nov. 22, 1948. [173]

[Title of Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed M. Bryan, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify the foregoing typewritten pages numbered 1 to 173, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary

to the hearing of the appeal thereon in the United States Circuit Court of Appeals for the Ninth Circuit, in accord with designation of contents of record on appeal of the appellant, as the same remain on file and of record in the office of the Clerk of said District Court, and that the same constitutes the record on the appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk of this court for preparing and certifying the foregoing typewritten record amount to the sum of \$17.40, and that the same have been paid in full by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court, this 17th day of December, 1948.

(Seal) /s/ ED M. BRYAN,
Clerk.

[Endorsed]: No. 12135. United States Court of Appeals for the Ninth Circuit. Bert Ruud, Appellant, vs. American Packing & Provision Co., a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Eastern Division.

Filed December 20, 1948.

 /s/ PAUL P. O'BRIEN,
Clerk of the United Ctates Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

No. 12135

AMERICAN PACKING AND PROVISION CO.,
a corporation,

Plaintiff-Respondent,

vs.

BERT RUUD,

Defendant-Appellant.

STATEMENT OF POINTS

The points upon which appellant intends to rely on this appeal are as follows:

1. The Court erred in making its Finding of Fact V, for the reason that the written contract in suit, described in Finding of Fact III does not require the delivery of "good quality" steers, and there is no competent evidence to support any finding to that effect, and the effect of such finding is to vary and add to the terms of a written contract.

2. The Court erred in overruling appellant's objections to testimony relative to quality of steers claimed to have been intended under the contract, for the reason that such testimony was incompetent, irrelevant and immaterial, and tended to vary and add to the terms of a written instrument.

3. The Court erred in making Finding of Fact IX, for the reason that there is not sufficient competent evidence to support the same, said Finding in legal effect varies and adds to the terms of a written instrument, and all the evidence as to probable weight of cattle at the time delivery was de-

manded was based on mere speculation and conjecture.

4. The Court erred in overruling appellant's objections to questions asked the witness Bert Ruud as to what he estimated the steers he intended to get would have weighed at the time delivery was demanded, for the reason that such testimony was incompetent, irrelevant and immaterial, the contract did not call for cattle of any particular weight, such testimony was necessarily based on mere speculation and conjecture, and tended to vary and add to the terms of a written instrument.

5. The Court erred in overruling appellant's objections to testimony concerning the weight and quality of certain cattle sold by appellant at Idaho Falls in the fall of 1947, and in the admission of Exhibits 5 and 6, sales records concerning same, for the reason that such testimony and exhibits were incompetent, irrelevant and immaterial, had no bearing on any of the issues of the case, and there is not sufficient evidence to show, or even tend to show, that such cattle were the cattle covered by the contract, and the evidence affirmatively shows that said cattle were not the contract cattle.

6. The Court erred in making its Findings of Fact XII and XXII, both concerned with the market price of steers on the Ogden market at the time delivery under the contract was demanded, for the reason that there is not sufficient evidence to support the same, and the evidence is contrary thereto, and the Court further erred in making Finding of Fact XXIII, to the effect that respondent did suf-

fer damages, the same being contrary to the evidence, and based upon mere speculation and conjecture.

7. The court erred in refusing to permit appellant to impeach the witness Louis Salerno by the use of his pre-trial deposition, under Rule 26 (d) (1).

8. The Court erred in denying appellant's offer of proof, in which appellant offered to prove by the witness Bert Ruud, that at the time the contract was negotiated with respondent's agent, Louis Salerno, immediately prior to the signing of the contract, the defendant did not have three hundred steers, or any other number whatever, on his ranch, and did not own any steers which would be the subject matter of the contract, that the contract was delivered conditionally upon his obtaining such steers to be the subject matter of the contract; that the steers were never obtained, and that the contract was never delivered and never became effective, for the reason that the court's ruling denying said offer of proof was contrary to law.

9. The Court erred in making Findings of Fact III, XV and XXI, all referring to the making and delivery of the contract in suit, to the effect that the contract was fully and unconditionally delivered, or, if conditionally delivered, the conditions were waived by appellant, for the reason that there is not sufficient evidence to support the same, and the evidence is contrary thereto, in that the evidence establishes that the contract was delivered by appellant subject to the condition precedent that the

contract was not to be in effect unless and until appellant obtained cattle to fill it, and to the further condition that certain provisions therein relating to an allowance of three per cent for shrinkage be eliminated, and the evidence discloses that these conditions were never met.

Further, said Findings in legal effect are inconsistent with Finding IV, to the effect that the original contract was modified.

10. The Court erred in making Findings of Fact IV, XIV, XVII and XVIII, to the effect that the original contract was modified only as to the number of steers to be delivered, for the reason that there is not sufficient evidence to support the same, and the same are contrary to the evidence, in that the evidence establishes that the original contract described in Finding III was abandoned by the parties by the substitution of a new and different agreement, which was in no sense only a modification of the original contract.

11. The Court erred in overruling appellant's motion to dismiss at the close of respondent's case.

12. The Court erred in making its Findings of Fact, VI, XIII, XVI, all to the effect that the plaintiff fully complied with the conditions, stipulations and agreements of said contract by paying the down payment required, and by reason thereof there was no failure of consideration, for the reason that said Findings are contrary to the evidence, in that the evidence establishes that the respondent never made the down payment called for by the terms of the original contract described in Finding III,

and the payment subsequently made by respondent shows on its face and by other evidence that it was made on another and different subsequent agreement.

13. The Court erred in making Findings of Fact VIII and XX, to the effect that appellant refused to perform the contract and did not offer to perform, for the reason that the same are not sustained by the evidence, and the uncontradicted evidence shows that appellant offered both orally and in writing to deliver steers to respondent to fill any obligation which might exist on his part.

/s/ ALBAUGH, BLOEM,
HILLMAN & BARNARD,
Attorneys for Appellant.

[Endorsed]: Filed January 10, 1948. Paul P. O'Brien, Clerk.

